

IN THE  
**Supreme Court of the United States**

Supreme Court, U. S.

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October Term, 1977

No. \_\_\_\_\_

**78-10**

CHARLES O. FINLEY & Co., INC., an Illinois corporation,  
*Petitioner,*

vs.

BOWIE K. KUHN, Commissioner of Baseball, *et al.*,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT.**

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CHARLES O. FINLEY & CO., INC., an Illinois corporation,  
*Petitioner,*

vs.

BOWIE K. KUHN, Commissioner of Baseball, *et al.*,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT.**

The Petitioner Charles O. Finley & Co., Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 7, 1978.

**Opinion Below.**

The opinion of the Court of Appeals, reported at 569 F.2d 527 (See Appendix to June 19, 1978 Advance Sheet), appears in the Appendix hereto. The three opinions rendered by the District Court for the Northern District of Illinois were not reported; they too appear in the Appendix hereto together with the Findings of Fact and Conclusions of Law.

### Jurisdiction.

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 7, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

### Questions Presented.

1. Whether this Honorable Court intended by its decisions of *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 66 L. Ed. 898, 42 S. Ct. 465 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 98 L. Ed. 64, 74 S. Ct. 78 (1953), and *Flood v. Kuhn*, 407 U.S. 258, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972), to exempt the entire *business of baseball* or merely its *reserve system* from the federal antitrust laws.

2. Whether Article VII, Section 2 of the Major League Agreement, pursuant to which the Major Leagues and their constituent clubs purport to waive their right of recourse to the courts concerning all future decisions of the Commissioner of Baseball, violates public policy under numerous decisions rendered by this Court, the federal and state courts.

3. Whether the Appellate Court's affirmance of the District Court's refusal to receive or consider evidence of Commissioner Kuhn's malice toward Petitioner as a motive for disapproving Petitioner's assignments constitutes reversible error and a denial of Petitioner's Due Process right to present evidence on a material issue.

4. Whether the Appellate Court's affirmance of the District Court's failure to find on the material issue of the procedural unfairness of Commissioner Kuhn's disapproval of the subject assignments constitutes reversible error.

5. Whether the Appellate Court's affirmance of the District Court's finding that the Commissioner's action was authorized is unsupported by and inconsistent with the substantial evidence, due to:

(a) Both lower courts' complete disregard of the fifty-five (55) year practice of the parties to the Major League Agreement whereby the Commissioner perfunctorily approved all assignments in compliance with the Major League Rules and on several occasions expressly disclaimed authority to disapprove assignments;

(b) The District Court's admission of and prejudicial reliance on the unexpressed intentions of twenty-one parties to the Major League Agreement concerning the Commissioner's authority pursuant to the Major League Agreement and Rules to disapprove assignments; and

(c) The District Court's exclusion of the Congressional testimony of physically unavailable former Commissioner Ford Frick which directly contradicted Commissioner Kuhn's contention that he was authorized to disapprove assignments which complied with the Major League Rules and were untainted by immorality and dishonesty.<sup>1</sup>

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<sup>1</sup>In order to achieve the brevity required in a Petition for Certiorari, Petitioner will not argue this voluminous issue herein but does wish to reserve it should the Court grant certiorari.

### **Constitutional and Statutory Provisions Involved.**

United States Constitution, Amendment V:

"No person shall . . . be deprived of life, liberty or property, without due process of law. . . ."

United States Code, Title 15, §1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

### **Statement of the Case.**

On June 15, 1976 the Oakland Athletics Division of Petitioner Charles O. Finley & Co. assigned the contracts of players Joe Rudi and Rollie Fingers to the Boston Red Sox for \$1 Million each and assigned the contract of Vida Blue to the New York Yankees for \$1½ Million. On June 18, 1976, Commissioner of Baseball Bowie K. Kuhn, asserting reliance on Article I, Section 2 of the Major League Agreement and Major League Rule 12(a), disapproved these assignments, thus depriving Petitioner of the moneys it was to have received for these player contracts. At the time of the assignments players Rudi and Fingers were unsigned to 1976 contracts and were playing out the renewal year of their 1975 contracts. June 15, 1976, which was the "trade deadline", therefore constituted the last opportunity for Petitioner to assign the contracts of Rudi and Fingers for more than \$20,000 before they became free agents at the end of the season. In November, 1976 both Fingers and Rudi became free agents and signed contracts with other clubs. Petitioner received no compensation for the loss of either player's contract. [R.T. 256-8.]

Petitioner Charles O. Finley & Co., Inc., an Illinois corporation, is the owner of the Oakland Athletics, a member of the American League of Professional Baseball Clubs, and a signatory of the Major League Agreement.

Respondent Bowie K. Kuhn, a New Jersey resident, has been the duly elected "Commissioner of Baseball" since 1969.

Respondent Boston Red Sox, a Massachusetts trust, is the owner of the Boston Red Sox, a member of the American League, and a signatory of the Major League Agreement. The New York Yankees, an Ohio partnership, is the owner of said baseball club, a member of the American League and a signatory of the Major League Agreement.

Respondent American League of Professional Baseball Clubs is an unincorporated association comprised of the twelve (now fourteen) American League Clubs and is a signatory of the Major League Agreement. Respondent National League of Professional Baseball Clubs is an unincorporated association comprised of the twelve National League Clubs and is a signatory of the Major League Agreement.

The Major League Agreement is a contract between the twenty-four (24) (now twenty-six) clubs of the American and National Leagues establishing the office of the Commissioner of Baseball. The Major League Agreement was originally adopted on January 12, 1921 as a direct result of the Black Sox Scandal—the "throwing" of the 1919 World Series by Chicago White Sox players. The Office of Commissioner was evolved to restore and maintain public confidence undermined by the Scandal in the honesty of the game and the integrity

of its performers. To accomplish that purpose the Commissioner, under Article I, Section 2 of the Major League Agreement, was given authority "To investigate . . . any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of baseball . . . To determine . . . what preventive, remedial or punitive action is appropriate . . . and to take such action." [Ex. I-B-48; Ex. K-51, p. 1.] Upon the adoption of this provision the drafter of the Major League Agreement informed the parties thereto that they were "vesting the power to enforce the rules of baseball, the rules of honesty, the prevention of immoral practices . . . in the Commissioner." [Ex. II-B-1, p. 9.] The Major League Agreement has been periodically readopted by the parties thereto since 1921 and was in force in substantially the same form as originally adopted at all relevant times herein. [Ex. I-B-47.]

Pursuant to Article IV of the Major League Agreement, the Major League clubs have adopted fifty (50) Major League Rules to govern the game of baseball.

Under Major League Rule 9, the clubs may assign the contracts of their players at will. [Ex. I-B-47; I-B-53, p. 2.]

Major League Rule 10, the waiver rule, prohibits a club from assigning a player's contract to another Major League Club after midnight June 15 of the championship season (the "trade deadline") unless waivers have been requested and received from each club in its own league. By claiming a player on waivers a club may purchase the player's contract for the waiver price—\$20,000—unless the request for waivers is revoked. [Ex. I-B-47.]

Major League Rule 12(a) provides that player contract assignments shall not be recognized as valid unless within fifteen (15) days after execution a counterpart original of the document shall be filed with the Secretary-Treasurer of the Executive Council and approved by the Commissioner. [Ex. I-B-47.]

From the adoption of the Major League Agreement in 1921 through June 15, 1976 the Commissioner's Office had always perfunctorily performed its duties under Major League Rule 12(a) by simply determining whether assignment documents complied with the Major League Rules and then automatically filing them for record-keeping purposes. [R.T. 229-30; 232-5; 239; 550; 554; 585-6; 654-6; 756-7.] During this fifty-five (55) year period no undisputed assignment which fully complied with the Major League Rules and was untainted by immorality and dishonesty was ever disapproved. [R.T. 585; 455; 537-8; 554.] Commissioner Kuhn confirmed the ministerial nature of the Commissioner's function in the player assignment process during the 1972 hearings before the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives:

"THE CHAIRMAN. In other words, the club can assign the contract to another club.

MR. KUHN. That is correct.

THE CHAIRMAN. They must have your consent, of course.

MR. KUHN. No, they must not. The Commissioner is not given a right of consent on a contract transfer. These things are processed through our office, but unless there is some irregularity, our office would not intervene in a contract transfer." [R.T. 571.]

Contracts of star players have been regularly sold throughout baseball's history without any interference or objection by the Commissioner of Baseball. Prior to June 15, 1976 no assignment was ever disapproved on the ground it involved too much money, the players were too talented, or for any reason unrelated to the Major League Rules. [R.T. 237; 260; 467; 1520; 1566-7.] Prior to the subject assignments there had been five (5) cash sales of three (3) or more players, all of which were perfunctorily approved without question as to their propriety by the Commissioner of Baseball. [R.T. 41; 55-56; 134-142; 1067-1069; 1257; Ex. I-C-13, 14, 18, 19, 20, 21, 22; I-B-2, pp. 290-328.]

Through 1975 the owners of Major League baseball clubs were able, through the "reserve system", to retain control of a player by unilaterally renewing his contract, even if the player refused to sign a new contract. *Flood v. Kuhn*, 407 U.S. 258, 259 f.n. 1 (1972), [R.T. 158-159.] However, on December 23, 1975 an Arbitration Panel ruled that under the "reserve system" the Major League clubs had no right or power to reserve the services of players for their exclusive use for any period beyond the "renewal year" in the contracts. *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n.*, 409 F. Supp. 233, 237 (W.D. Mo. 1972) [the "Messersmith" decision.] The ruling was upheld by a federal district court [*Id.*] and was affirmed on appeal on March 9, 1976. *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n.*, 532 F.2d 615 (8th Cir. 1976). As a result of the *Messersmith* decision, 1976 was the first year that players who did not sign a contract by the end of the championship season would automatically become free agents, free from all contractual

ties to the club for whom they had previously been playing and free to contract with other clubs. [R.T. 170-171.]

Subsequent to the *Messersmith* decision, eight (8) star players on Petitioner's club were unsigned and were playing out their renewal year—Sal Bando, Vida Blue, Bert Campaneris, Rollie Fingers, Ken Holtzman, Reggie Jackson, Joe Rudi and Gene Tenace. [R.T. 670-672.] All were demanding no-cut, no-trade, multi-year, large cash contracts. [R.T. 670-671, 673-676, 687.] After discussions with the players, Petitioner's President, Charles O. Finley, concluded that Oakland would not be financially able to sign all of them. He therefore attempted to assign some of their contracts for those of other players up through June 14, one day prior to the trade deadline, but was unsuccessful in negotiating an agreement by which Oakland received equal talent in return. [R.T. 680-689.]

On June 14, 1976, Finley made an offer to the Boston Red Sox whereby Oakland would assign the contracts of Rudi and Fingers, both still unsigned, to Boston for \$1 Million each. [R.T. 689.] Boston accepted the offer the next day—June 15—and Petitioner duly notified Rudi and Fingers and the Commissioner's office of the assignments on that date. [R.T. 689-690.]

On June 15, 1976, the New York Yankees offered to purchase the contract of Vida Blue for \$1,500,000 [R.T. 698-699], which offer Petitioner accepted in writing [Ex. I-B-8] and of which it duly notified Blue and the Commissioner's office. [R.T. 700.]

The assignments of the contracts of Rudi, Fingers and Blue were consummated only hours before midnight

June 15, 1976, after which Petitioner could not have assigned said contracts for more than \$20,000 apiece without waivers from all American League clubs. Because of the star calibre of all three players it was common knowledge in baseball that none of the players could pass waivers. [R.T. 322.]

The assignments of the contracts of Rudi, Fingers, and Blue involved no dispute between any of the participating clubs or players. [R.T. 756-7.] The assignments fully complied with all applicable Major League Rules. [R.T. 750-751.] The assignments were untainted by any immorality or dishonesty. [R.T. 756, 1871.]

On June 16, 1976, Commissioner Kuhn discussed the assignments with the members of the Major League Executive Council [R.T. 284-292] and then notified Petitioner, Boston, New York, American League President Lee MacPhail and the Major League Players' Association of a hearing on June 17 to discuss the assignments. [Ex. I-B-4; Ex. K-65.] At the inception of the June 17 hearing, Kuhn stated that he was concerned with the effect of the assignment on Oakland's competitive capacity, that the question of whether the assignments were consistent with the best interests of baseball's integrity and the maintenance of public confidence in the game, and that it was at least possible that he might not approve the assignments.<sup>2</sup> [Ex. K-66, pp. 4-6.] During the hearing Kuhn asked only one question—whether Blue had signed his contract. [Ex. K-66, pp. 33-34.] Finley then explained the

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<sup>2</sup>Both Finley and New York owner George Steinbrenner had informed Kuhn prior to the hearing that he lacked authority to disapprove the assignments. [R.T. 705-6; 1994.] Marvin Miller of the Major League Players' Association echoed their contentions at the hearing. [Ex. K-66, pp. 50-1.]

reasons which compelled him to make the assignments and added that the winning of five (5) consecutive division championships and three (3) straight World Championships proved that the Oakland organization was capable of keeping the team competitive. [Ex. K-66, pp. 9-35.]

On June 18, 1976, Kuhn disapproved the assignments of the contracts of Rudi, Fingers and Blue, stating that the assignments would leave Oakland "with little chance to compete effectively", undermine public confidence in baseball, open the door "to the buying of success by the more affluent clubs", and impair "efforts to preserve competitive balance." [Ex. K-67.]

On June 25, 1976 Petitioner filed its Complaint alleging seven causes of action. The First Cause of Action alleged that Kuhn breached his employment contract with Petitioner by acting arbitrarily, discriminatorily and unreasonably. The First Cause of Action further alleged that Kuhn was motivated by malice, prejudice and ill will toward Petitioner's owner Charles O. Finley, that Kuhn's action was the culmination of a prolonged effort to eliminate Finley from baseball, and his actions were a breach of the covenant of good faith and fair dealing implied in Kuhn's employment contract with Petitioner. The Second Cause of Action alleged that Kuhn, acting in concert with other named Respondents, conspired to eliminate Finley from baseball in violation of the federal antitrust laws. The Fifth Cause of Action alleged that Respondents unlawfully induced the breach of Petitioner's contracts with Boston and New York. The Sixth Cause of Action sought a declaratory judgment that Kuhn did not have the authority to disapprove Petitioner's assignments as

"not in the best interest of baseball." Petitioner's final cause of action sought specific performance of its contracts of assignment to Boston and New York.

The jurisdiction of the District Court over the First, Fifth, Sixth and Seventh Causes of Action was invoked because of diversity of citizenship [28 U.S.C. §1332 (a)(1)] and pendent federal jurisdiction [*United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)]. The jurisdiction of the District Court over the Second Cause of Action was invoked because of federal question jurisdiction [28 U.S.C. §1331(a)].

On July 16, 1976, Kuhn and the American and National Leagues moved for summary judgment on all counts. On September 8, 1976, the District Court granted the motion as to Petitioner's Second, Third and Fourth Causes of Action and denied the motion as to the remaining causes of action.

On December 17, 1976, trial began on the First, Fifth, Sixth and Seventh Causes of Action. The trial concluded on January 14, 1977, on which date the Court dismissed Boston and New York and requested simultaneous post trial memoranda from plaintiff and Kuhn. On March 17, 1977, the court entered Findings of Fact, Conclusions of Law and Judgment Order on the remaining causes of action in favor of Kuhn.

On March 28, 1977 plaintiff filed its Motion for New Trial and Motion to Amend and Supplement Findings of Fact and Conclusions of Law. Said motions were denied on April 7, 1977.

On April 18, 1977, Kuhn filed a counterclaim against plaintiff seeking to recover the costs of suit and attorney's fees and a motion for summary judgment on

the counterclaim. He was joined by Boston. On May 24, 1977 plaintiff filed a Counter-Motion for Summary Judgment on defendants' counterclaims.

On August 30, 1977, the court granted Kuhn's and Boston's Motion for Summary Judgment declaring that the blanket waiver of recourse to the courts contained in the Major League Agreement, Article VII, Section 2, is valid and enforceable. The Court, however, denied Kuhn's and Boston's prayer for damages.

On April 7, 1978 the Seventh Circuit Court of Appeals affirmed the judgment of the District Court on all counts.

## REASONS FOR GRANTING THE WRIT.

### 1. The Lower Courts Erred in Concluding That the Entire Business of Baseball Rather Than Merely the Reserve System Is Exempt From the Antitrust Laws.

Prior to trial the District Court entered summary judgment dismissing Petitioner's Second Cause of Action alleging a conspiracy to violate the Sherman Antitrust Act, 15 U.S.C. §1. The Appellate Court affirmed. Both judgments were based on the misconception that the entire business of baseball is exempt from the federal antitrust laws. [Summary Judgment Order dated September 7, 1976; Op., pp. 25-27.]

Petitioner submits that the antitrust exemption baseball enjoys shields only its *reserve system*. Petitioner alternatively submits that even under the most liberal construction baseball's exemption was intended only to cover those historically *essential sports practices* which developed and became an integral part of baseball prior to the 1953 *Toolson* decision in reliance on this Court's 1922 ruling in *Federal Baseball*. The allegations of Petitioner's Second Cause of Action do not constitute any part of baseball's *reserve system* nor one of its historically *essential sports practices*, but rather a newly-conceived restraint of trade destined to achieve the unwholesome *business* purposes of fixing the price for major league player talent and financially forcing Petitioner out of baseball. Thus, the District Court's summary judgment dismissing the Second Cause of Action and the Appellate Court's affirmance thereof must be reversed and remanded for trial.

The extreme danger portended to Baseball's tens of owners, hundreds of sponsors and business affiliates, thousands of employees and millions of fans by the lower courts' erroneous judgments that the entire business of baseball is exempt from the antitrust laws was prophetically stated by Congress nearly thirty years ago when it expressly rejected bills providing for such *carte blanche* immunity:

"If a blanket immunity were granted, all appeals to the courts from a possibly arbitrary decision by the rulers of professional baseball would be foreclosed. . . . The possibility, however remote, that power will be misused in the future makes it unwise perpetually to preclude resort to the courts in such cases." *Organized Baseball*: House Report No. 2002, 82d Cong., 2d Sess., at 230 [hereinafter "Celler Report"].

Petitioner urges this Court to observe Congress' wise counsel and intent by reversing the judgment on this important question of federal law.

This Court's holdings in *Federal Baseball*, *Toolson* and *Flood*, the rationale for continuing baseball's exemption expressed in those decisions, and the numerous unequivocal Congressional pronouncements on the issue unerringly point toward one conclusion: only baseball's *reserve system*, not its entire business, is exempt from the federal antitrust laws. The *holdings* in *Federal Baseball*, *Toolson* and *Flood*, which are all that are entitled to the application of the rule of *stare decisis*, only exempt the *reserve system*. This Court countenanced baseball's outmoded exemption in *Toolson* and *Flood* for two reasons. First, for thirty years baseball

had detrimentally relied “upon the understanding that the *reserve system* was not subject to the existing federal antitrust laws.”<sup>3</sup> *Id.* at 407 U.S. 274. Second, due to Congressional inaction despite awareness of *Federal Baseball* “The Court . . . concluded that Congress as yet has no intention to subject baseball’s *reserve system* to the reach of the antitrust statutes.” *Id.* at 407 U.S. 283. Finally, Congress, after studying every aspect of baseball, has expressly rejected an exemption for the entire “business of baseball” [Celler Report, p. 230] and acquiesced in and endorsed an exemption for only the *reserve system*. *Final Report of The Select Committee on Professional Sports*, H.R. No. 94-1786, 94th Cong., 2d Session, p. 38 (1977) [hereinafter “Final Report”].

Further, prior to the *Toolson* decision Congress presumed *Federal Baseball* would be overruled [Final Report, p. 37]; after *Toolson* Congress consistently stated that it considers baseball’s *judicially-created* exemption to shield no more than baseball’s historically *essential sports practices*, not its *business* aspects. H.R. Rep. No. 1303, 88th Cong., 2d Session, at 2, 6, 8 (1964); Senate Report No. 462, 89th Cong., 1st Session, at 13, 15 (1965).

The allegations of Petitioner’s Second Cause of Action, which must be taken as true, *United States v. International Boxing Club*, 348 U.S. 236, 240, 99 L. Ed. 290, 75 S. Ct. 259 (1955) unquestionably

<sup>3</sup>Baseball’s *reliance* on this exemption no longer remains a valid reason for its continuance. In 1976 the heart of the *reserve system*—the right of the major league clubs perpetually to retain control of their players by unilaterally renewing their contracts—was limited to one year by the *Messersmith* decision, *supra* at 532 F.2d 615. Since the heart of the system no longer exists, there is no reason to continue its now meaningless exemption from the antitrust laws.

state a cause of action under the federal antitrust laws. *Klors v. Broadway-Hales Stores*, 359 U.S. 207, 3 L. Ed. 741, 79 S. Ct. 705 (1959); *United States v. General Motors Corp.*, 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960). Likewise, these allegations clearly do not constitute any part of baseball’s *reserve system* nor one of its historically *essential sports practices*. Instead, the alleged acts constitute a newly-conceived restraint of trade designed to further the *business* interests of the other major league clubs by fixing the price of free agent player talent and financially forcing Petitioner out of baseball.

Petitioner has alleged that the twenty-three major league clubs conspired amongst themselves and with Respondent Kuhn in the furtherance of their own self-interests to boycott and restrain trade with Petitioner’s business and to compel Petitioner to sell its baseball interests. [Complaint, paragraph 25.] Petitioner’s Complaint further states that the conspirators, whose rosters form the exclusive market for the acquisition and disposition of major league player contracts: (1) concertedly refused to purchase the contracts of Rudi, Fingers and Blue or to permit the sale of their contracts to the Boston Red Sox and the New York Yankees [Complaint, paragraph 35]; (2) restricted Petitioner’s access to the exclusive market for major league player contracts [Complaint, paragraph 33]; and (3) deprived Petitioner of the historic freedom to sell and dispose of its assets for a competitive, market price. [Complaint, paragraph 33.] Finally, Petitioner alleged that the Respondents committed these acts in furtherance of their motive, intent and design to (1) fix at an artificially

low level the price at which major league *players themselves* could, as free agents, sell their services, and (2) drive Petitioner, an ostracized member of baseball's elite, out of baseball. [Complaint, paragraph 33.]

In *Federal Baseball*, *Toolson* and *Flood* it was only baseball's *reserve system*, not its entire business, which the plaintiffs attacked as a violation of the antitrust laws and which this Court exempted therefrom. In *Federal Baseball*, *supra*, plaintiff, the Baltimore club of the disbanded Federal League, alleged that the members of the American and National Leagues monopolized the interstate commerce of baseball "principally through what is called the '*reserve clause*'". *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore*, 269 Fed. 681, 684 (D.C. Cir. 1921). [Emphasis added.] This Court observed that "The business (of) giving exhibitions of baseball . . . is not a subject of commerce," and therefore held that "*the restrictions by contract that prevented the plaintiff from getting players to break their bargains (i.e., the 'reserve clause')* and the other conduct charged against the defendants *were not an interference with commerce among the other states.*" *Federal Baseball*, *supra*, at 259 U.S. 209. [Emphasis and parenthesis added.]

Thus, the specific *holding* in *Federal Baseball* was that the *reserve clause*, by which the American and National Leagues allegedly controlled all major league baseball talent and thereby monopolized baseball, did not constitute an interference with interstate commerce. Moreover, the determinative issue in *Federal Baseball* was that professional baseball, as it existed in 1922, did not constitute interstate commerce. This view was

completely repudiated in *Flood v. Kuhn*, *supra*, at 407 U.S. 282, when this Court held that "Professional baseball is a business and it is engaged in interstate commerce." The erroneous foundation for *Federal Baseball's* narrow holding that baseball's *reserve system* did not constitute an interference with interstate commerce having been erased, reliance on *Federal Baseball* to support a "blanket" exemption for the entire "business of baseball" is totally misplaced.

*Toolson v. New York Yankees*, *supra*, consolidated three cases, each of which alleged that baseball's "*reserve clause*" violated the antitrust laws. *Id.* at 346 U.S. 362-4. In a short *per curiam* decision which did not discuss the merits or underlying issues of the cases this Court merely affirmed the judgments of dismissal rendered below in reliance on *Federal Baseball*, *supra*. As this Court noted in *Flood v. Kuhn*, *supra* at 407 U.S. 276, "In short, *Toolson* was a narrow application of the rule of *stare decisis*."

It is well established that under the rule of *stare decisis* the language and general expressions in an opinion should be limited and construed in light of the issues presented and considered and should not be extended beyond those issues in another case. To be binding there must have been an application of the judicial mind to the precise question necessary to be determined in order to fix the rights of the parties. *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 50 S. Ct. 59, 74 L. Ed. 180 (1929); *Mutual Benefit Health & Accident Ass'n. v. Bowman*, 99 F.2d 856, 858 (8th Cir. 1938).

Since both *Federal Baseball* and *Toolson* only involved challenges to baseball's *reserve system*, the pre-

cise question necessarily determined in both cases was that baseball's *reserve system* does not constitute interference with interstate commerce. Application of the rule of *stare decisis* compels the conclusion that *Federal Baseball* and *Toolson* exempted only the *reserve system* from the antitrust laws. The conclusion drawn by both the district and appellate courts from the general language used in *Federal Baseball* and *Toolson*—that the entire “business of baseball” is exempt from the antitrust laws—is therefore in error and must be reversed.

In *United States v. Shubert*, 348 U.S. 222, 228-9, 99 L. Ed. 279, 75 S. Ct. 277 (1954); the Court reiterated that *Federal Baseball* and *Toolson* involved the same issue—that only baseball's “*reserve clause*” is exempt from the federal antitrust laws. The Court therefore ruled that those holdings could not be extended to the business of legitimate theatre, which like baseball involved the live presentation of local exhibitions.

Finally, in *Flood v. Kuhn, supra*, this Court explicitly recognized that the cases of *Federal Baseball*, *Toolson* and *Flood* held only baseball's *reserve system* exempt from the antitrust laws. The Court further concluded that Congress had acquiesced in an exemption only for baseball's *reserve system*.

In *Flood* the petitioner, a star outfielder for the St. Louis Cardinals, contended the reserve system constituted a violation of the federal antitrust laws. The Court, in reference to *Federal Baseball* and *Toolson*, defined the issue as follows:

“For the third time in 50 years the Court is asked specifically to rule that professional baseball's *reserve system* is within the reach of the federal antitrust laws.”

and ultimately concluded that:

“With its *reserve system* enjoying exemption from the federal antitrust laws, baseball is in a very distinct sense, an exception and an anomaly.” *Flood v. Kuhn, supra* at 407 U.S. 259, 282. [Emphasis added.]

The Court's discussion of the reasons for continuing baseball's admittedly anomalous exemption further confirms that it is only the *reserve system* which is exempt. First, the Court noted that baseball had been left alone to develop for the thirty-year period between *Federal Baseball* and *Toolson*, during which time baseball justifiably relied “upon the understanding that the *reserve system* was not subject to existing federal antitrust laws.” *Id.* at 407 U.S. 274. Thus, any detrimental reliance on the part of baseball was clearly limited to its *reserve system*.

Second, the Court ascribed to Congress only the intention that baseball's *reserve system* enjoy exemption from the antitrust laws. The Court noted that since *Toolson* more than fifty bills concerning baseball's relationship to the antitrust laws had been introduced in Congress, and that the few that passed one house or the other “would have expanded, not restricted, the *reserve system's* exemption to other professional league sports.” *Id.* at 407 U.S. 281, [Emphasis added.] The Court therefore “concluded that Congress as yet has had no intention to subject baseball's *reserve system* to the reach of the antitrust statutes.” *Id.* at 283. [Emphasis added.]

For the Court the single most important Congressional statement on this issue was the 1952 Celler Report's endorsement of baseball's reserve system, which the Court quoted at length. *Id.* at 407 U.S. 272-

3. When the quoted portion of the Celler Report is read in context with the Report's conclusion, it becomes clear that this Court was fully aware that Congress never intended the entire business of baseball to be exempt from the antitrust laws.

The Celler Report stated that the major problem presented "was whether baseball and all other professional sports enterprises should be granted *carte blanche immunity* from the antitrust laws . . ." [*Id.* at 3.] At the conclusion of its report, the Subcommittee discussed five possible alternative solutions to this problem, the second of which asked "Should professional baseball be granted *a complete immunity* from the antitrust laws?" As quoted *supra*, the Subcommittee expressly rejected this alternative. Celler Report, p. 230.

Since 1952 Congress has repeatedly evinced not only strong opposition to baseball's *judicially-created* exemption from the antitrust laws, but also the clear understanding that only baseball's historically *essential sports practices* are so exempt. For instance, in its 1964 Report the Committee on the Judiciary perceived that "under Supreme Court decisions baseball now enjoys judicial exemption for its *essential sports practices* which is not accorded to football, basketball and hockey." H.R. Rep. No. 1303, 88th Cong., 2d Sess., at 2 (1964). In 1965 the Senate, after determining that the antitrust laws *would* apply to CBS's acquisition of the New York Yankees, reaffirmed this position by concluding that "the public interest is best served by *keeping* the *business aspects* of the team sports involved *within* the antitrust laws while the *essential sports activities*

are exempted." Senate Report No. 462, 89th Cong., 1st Sess., at 13, 15 (1965).

Congress' most recent pronouncement on the subject is the 1977 Final Report of the Select Committee on Professional Sports, which extensively reviewed "the history of baseball's acquisition and retention of its immunity from antitrust scrutiny." The Report concluded that the exemption resulted not from Congress, which never intended baseball to be exempt, but from "the Supreme Court's misreading of Congressional intentions in this area and the manner in which baseball took advantage of this situation as well as the intricacies of the diverse legal and administrative forums of our federal system." [Final Report, p. 35.]

The Select Committee reviewed the leading Congressional study on this issue—the 1952 Celler Report—and unequivocally reaffirmed that Subcommittee's conclusion "that the legislative grant of complete immunity would be *wrong* because of the potential that such power would be used arbitrarily." [*Id.* at 38.] The Select Committee then independently found "that the burden of showing why baseball should not be treated differently from other professional sports is squarely on baseball itself . . . The Committee concludes that *baseball has not met its heavy burden of justification.*" [*Id.* at 53.] [Emphasis added.]

However, the Select Committee recognized that the Celler Committee "saw the necessity for some form of modified player allocation (reserve) system. But it felt that legislative action was unnecessary until such time as the courts declared baseball's reserve system unreasonable under the antitrust laws." [*Id.* at 38.] [Parenthesis *not* added.] The Select Committee

noted that the Celler Committee enacted no legislation regarding any aspect of baseball because "it premised its reasoning and conclusions on the expectation that *Federal Baseball* would be overruled and "baseball was assuring the subcommittee it would test its rules under the rule of reason." [*Id.* at 37, 38.]

In summary, during the last thirty years Congress has (1) repeatedly and expressly rejected a blanket exemption for the entire "business of baseball;" (2) criticized this Court for misreading Congressional intent and creating any exemption for baseball; (3) stated that baseball's *judicially-created* exemption shields no more than baseball's *essential sports practices* and *not* its *business aspects*; and (4) after studying every aspect of baseball, endorsed protection only for the *reserve system*. This history thoroughly refutes the holding ascribed to this Court by the District and Appellate Courts below—that Congress intended the entire "business of baseball" to be exempt. However, it is entirely consistent with this Court's actual and much narrower conclusion: "That Congress as yet has had no intention to subject baseball's *reserve system* to the reach of the antitrust statutes." *Flood v. Kuhn, supra* at 283.

In view of the fact that Petitioner's Second Cause of Action does not attack any part of baseball's reserve system nor one of baseball's historically essential sports practices, Petitioner respectfully submits that the judgment of the Appellate Court affirming the District Court's summary dismissal of that Cause of Action must be reversed.

## 2. **Baseball's Blanket Waiver of Recourse to the Courts Violates Public Policy and Is Unenforceable.**

The District Court held Article VII, Section 2 of the Major League Agreement, pursuant to which the Major Leagues and their constituent clubs purport to waive their right of recourse to the courts concerning the decisions of the Commissioner, to be valid and enforceable on the theory that this Court's decisions of *D. H. Overmyer Co., Inc. v. Frick*, 405 U.S. 174, 31 L. Ed. 2d 124, 92 S. Ct. 775 (1972); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972), and *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974) "clearly signal the total repudiation of the argument that covenants not to sue are contrary to public policy." [Judgment Order, August 29, 1977, p. 72.] The Appellate Majority, citing this same theory and these same cases, affirmed. [Op., pp. 32-33.] However, the Majority shrank from the vastness of this holding and, without any citation of law or evidence, created narrow exceptions to baseball's unlimited waiver clause. [Op., p. 33.]

Petitioner submits that the upholding of baseball's blanket waiver of recourse to the courts presents a chilling threat to the civil and property rights of not only the owners and players<sup>4</sup> of the national pastime

<sup>4</sup>Pursuant to Section 9(a) of the Uniform Player Contract every major league baseball player agrees "to accept, abide by and comply with all provisions of the Major League Agreement." [Ex. I-B-60.]

but also the literally millions of Americans, such as doctors,<sup>5</sup> dentists<sup>6</sup> and even cattle<sup>7</sup> and swine breeders,<sup>8</sup> whose businesses, careers or professions are stanchioned upon membership in the often monopolistic private associations controlling their chosen trade. By adopting the blanket waiver of recourse to the courts approved below, "trade and professional associations exercising virtually monopolistic control" over their members' "opportunity of earning a livelihood" [*Falcone v. Middlesex County Medical Society*, *supra* at 89 A.L.R. 2d 963 (1963)] can and will foreclose their members from challenging any future association action, regardless of its motivation or effect.

Significantly, the Appellate Court's decision directly conflicts not only with numerous decisions of other courts of appeal on this same matter, *See esp. McCulloch v. Clinch-Mitchell Const. Co.*, 71 F.2d 17, 21 (8th Cir. 1934); *Mitchell v. Dougherty*, 90 Fed. 639 (3d Cir. 1898); *See also United Fuel Gas Co. v. Columbian Fund Corp.*, 165 F.2d 746, 749 (4th Cir. 1948); *Tatsuuma Kisan Kabushiki Kaisha v. Prescott*, 4 F.2d 670, 671 (9th Cir. 1925); *Owsley v. Yerkes*, 187 Fed. 560, 563 (2d Cir. 1911); but also with several decisions rendered by this Court. *Guaranty Trust & Safe Deposit Co. v. Green Cove R.R.*, 139 U.S. 137, 143, 35 L. Ed. 116 (1891); *Home Ins.*

<sup>5</sup>*See Falcone v. Middlesex County Medical Society*, 34 N.J. 582, 170 A.2d 791, 89 ALR 2d 952 (1961).

<sup>6</sup>*Pinsker v. Pacific Coast Society of Orthodontists*, 1 Cal. 3d 160, 460 P.2d 495 (1969).

<sup>7</sup>*See McCreery Angus Farms v. American Angus Ass'n.*, 379 F. Supp. 1008 (S.D. Ill.), *aff'd* 506 F.2d 1404 (7th Cir. 1974).

<sup>8</sup>*See Jackson v. American Yorkshire Club*, 340 F. Supp. 628 (D. Iowa 1971).

*Co. v. Morse*, 87 U.S. 445, 450, 22 L. Ed. 365 (1874); *See also Barge "Anconda" v. American Sugar Refining Co.*, 138 F.2d 765, 766 (5th Cir.), *aff'd* 322 U.S. 42, 46, 88 L. Ed. 1117, 64 S. Ct. 863 (1943). In *Guaranty Trust*, *supra*, this Court held a provision in a trust deed agreeing not to resort to the courts for its enforcement to be invalid as an improper attempt to oust the jurisdiction of the courts. In *McCulloch*, *supra*, a clause in a construction contract waiving "any and all right of action" arising from the decision of the chief engineer was held contrary to public policy since it sought to deny the parties their judicial remedies.

Petitioner therefore contends that the Appellate Court erred in upholding Article VII, Section 2 on the theory that the trend in the state and federal courts supports the conclusion that parties may entirely waive their recourse to the courts. All of the state, federal and Supreme Court decisions on which the Court relied involved limited and knowing waivers completely dissimilar to the unlimited and unknowing waiver at bench. Conversely, as the concurring opinion points out,<sup>9</sup> the Court disregarded the innumerable state, federal and Supreme Court decisions holding such blanket waivers void as against public policy.

By upholding Article VII, Section 2 of the Major League Agreement the Appellate Court provided the

<sup>9</sup>Chief Judge Fairchild accurately noted that "the latest judicial pronouncement on the subject strongly suggests that waiver of recourse to courts provisions are unenforceable and void in Illinois," and therefore refused to "proceed with the majority to the more sweeping holding that the waiver of recourse to the courts provision, unless narrow exceptions exist, is valid and binding on the parties and the courts." [Op., pp. 36-37.]

Commissioner of Baseball with an unlimited exculpatory clause far beyond the limited versions approved by American courts—one which purports to forever exempt him for every conceivable type of wrongdoing, intentional or negligent. There are two basic reasons why the American courts have universally refused to enforce such blanket waivers. First, the courts are open for the redress of injury done to person or property, and to permit a party to bar himself in advance from any resort to the courts for some future controversy of which he can have no knowledge at the time of the original agreement would inevitably result in injustice. *Westlake Community Hospital v. Superior Court*, 17 Cal. 3d 465, 479-480, 551 P.2d 410 (1976); *Meacham v. Jamestown F. & C. R. Co.*, 211 N.Y. 846, 105 N.E. 653, 656 (1914). Second, such waiver clauses, by providing that one of the parties to any anticipated dispute shall finally decide it and that the courts shall be ousted of their jurisdiction to review his decision, are entirely inconsistent with and repugnant to the salutary maxim that no man shall be the judge of his own case. *Employee Benefit Ass'n v. Johns*, 249 Pac. 764 (Ariz. 1926); *Wallace v. Brotherhood of Locomotive Firemen & Engineers*, 300 N.W. 322, 325 (Iowa 1941).

Article VII, Section 2 of the Major League Agreement combines both of these abhorrent features. The clause purports to bar the several Major League Clubs in advance from any resort to the courts for *all* future controversies, of which they could not possibly have had any knowledge at the time they entered into the agreement, and thereby exculpates the Commissioner of Baseball from any conceivable wrongdoing. The clause further permits the Commissioner not only to

decide disputes in which he is an interested party, but also to *instigate* a dispute and then unilaterally decide it without the review of the courts. Thus, Article VII, Section 2 contravenes public policy and is void.<sup>10</sup>

*Beuttas v. United States*, 60 F. Supp. 771, 780 (Ct. Cl. 1944) best summarizes the disdain the federal courts have expressed for blanket exculpatory provisions:

“Under numerous decisions of the Supreme Court of the United States and of other Federal courts and of the State courts . . . any agreement made in advance of the controversy which deprives a party of recourse to the courts is contrary to public policy and therefore void. . . .”

As *Beuttas* points out, prior to the judgment below a blanket waiver of recourse to the courts had “never been upheld.” *Id.* at 781.

However, even were this Court to conclude that federal law permits parties to a contract to waive all recourse to the courts, the strong public policy in opposition to such clauses of all the states involved in the subject transaction would prevent its enforcement. As *The Bremen* court noted, even “A contractual

<sup>10</sup>Article VII, Section 2 violates public policy for a third reason. In *Westlake Community Hospital v. Superior Court*, *supra* the California Supreme Court held a waiver of recourse clause in violation of public policy because it (1) purported to exculpate a party from his wilful and fraudulent wrongdoing and (2) constituted “the epitome of an adhesive provision, offered to affected doctors strictly on a take it or leave it basis.” *Id.* at 17 Cal. 3d 465, 480. Like the plaintiff in *Westlake*, Petitioner, in order to participate in Major League Baseball, had to become a signatory of the Major League Agreement and accept, over his vehement opposition in 1964 [R.T. 783-5], the waiver of recourse to the courts clause on a “take it or leave it basis.” Such an adhesive provision is unquestionably unenforceable.

*choice-of-forum* should be held *unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought.*" *The Bremen v. Zapata Off-Shore Co.*, *supra* at 15. All the states involved in the case at bar—California, Massachusetts and New York and the forum—Illinois—hold the blanket waiver of recourse to the courts to be against public policy, as do virtually all of the states in the union.<sup>11</sup> See *Westlake Community Hospital v. Superior Court*, *supra* (Calif.); *Meacham v. Jamestown F. & C. R. Co.*, *supra* (N.Y.); *Patton v. Babson Statistical Organization*, 156 N.E. 534 (Mass. 1927).

Several Illinois decisions specifically hold that contractual clauses waiving recourse to the courts violate public policy. *Cocalis v. Nazlides*, 308 Ill. 152, 139 N.E. 95 (1923); *In re Streck's Estate*, 35 Ill. App. 473, 183 N.E. 2d 26, 31 (1962). The majority ignored these decisions, relying instead on *American Federation of Technical Engineers v. La Jeunesse*, 63 Ill. 2d 263, 347 N.E. 2d 712, 715 (1976), which did not even involve a waiver of recourse clause. *La Jeunesse*, which the majority cited as holding "that courts . . . will not intervene in questions involving enforcement

<sup>11</sup>*Employee Benefit Ass'n v. Johns*, 249 P. 764 (Ariz. 1926); *Colt v. Hicks*, 179 N.E. 335 (Ind. 1932); *Supreme Council Catholic Benevolent Legion v. Grove*, 96 N.E. 159 (Ind. 1911); *Wallace v. Brotherhood of Locomotive Firemen and Engineers*, 300 N.W. 322 (Iowa 1941); *Specht v. Eastwood-Nealley Corp.*, 111 A. 2d 781, 786 (N.J. 1955); *Markham v. Supreme Court, I.O.F.*, 110 N.W. 638 (Neb. 1907); *Kelly v. Trimont Lodge*, 69 S.E. 764 (N.C. 1910); *Graham v. Alliance Hall Ass'n.*, 182 N.W. 463 (N.D. 1921); *Lough v. Varsity Bowl*, 237 N.E. 2d 417, 419-420 (Ohio 1967); *Myers v. Jenkins*, 57 N.E. 1089 (Ohio 1900); *Lane v. Brotherhood of Locomotive Engineers and Firemen*, 73 P.2d 1396 (Or. 1937); *Pepin v. Societe St. Jean Baptiste*, 49 Atl. 387 (R.I. 1901); *Honea v. American Council*, 201 S.W. 127 (Tenn. 1918); *Pearson v. Anderburg*, 80 Pac. 307 (Utah 1904).

of private association by-laws and matters of discipline" [Op., p. 29], is completely distinguishable from the case at bench, in which \$3½ Million was at stake. "Where the controversy concerns money or property rights or demands, as distinguished from matters of discipline, policy, or doctrine, the right to resort in a proper case to a court of equity will not be abridged by provisions of the organization's constitution." *O'Brian v. Matual*, 14 Ill. App. 2d 173, 198, 144 N.E. 2d 446 (1957). See e.g. *Pinsker v. Pacific Coast Society of Orthodontists*, *supra* at 164-5; *Green v. Obergfell*, 121 F. 2d 46, 55-6 (D.C. Cir. 1941).

Contrary to the District and Appellate Courts' conclusion, this Court's decisions in *Overmyer*, *Bremen* and *Scherk* have not abrogated the long-standing state and federal rule that a blanket waiver of recourse to the courts contravenes public policy and is void. These three cases merely uphold the constitutionality of a *cognovit note* containing a *limited* and *knowing* waiver of rights regarding an *existing* obligation [*D. H. Overmyer Co., Inc. v. Frick*, *supra*], rule that a *forum-selection clause* in an admiralty towage contract is enforceable if it does not effectively deprive the libellant "of his day in court" [*The Bremen v. Zapata Off-Shore Co.*, *supra* at 407 U.S. 18], and enforce an agreement to *arbitrate* in Paris, France under the United States Arbitration Act, 9 U.S.C. Section 2, which arbitration, once complete, would be *reviewable* by the *federal courts* under 9 U.S.C., Section 10. [*Scherk v. Alberto-Culver*, *supra* at 417 U.S. 506, 511.] None of these cases even remotely supports the lower courts' holdings that baseball's *unlimited* and *unknowing* waiver of *all future recourse* to the courts is consistent with public policy and enforceable.

**3. The District Court's Refusal to Receive or Consider Evidence of Commissioner Kuhn's Malice Toward Mr. Finley, as Affirmed by the Appellate Court, Constitutes Reversible Error and a Denial of Petitioner's Due Process Right to Present Evidence.**

The District Court repeatedly refused to receive or consider, and barred cross-examination of the Commissioner designed to elicit, any evidence that the Commissioner's action was motivated by his malice toward Petitioner's President, Charles O. Finley. The District Court based these patently erroneous rulings on the fallacious rationale that such evidence was *irrelevant* to the only issue the Court perceived in the case—the contractual authority of the Commissioner. [R.T. 810-812; 2003.] Universal case law holds that evidence of malice or personality differences which play a large part in a private association's decision concerning one of its members is highly relevant to the material issues of the decision's rationality and procedural fairness. *Van Daele v. Vinci*, 51 Ill. App. 2d 389, 72 A.L.R. 3d 414, *cert. den.* 409 U.S. 1007 (1972); *McCreery Angus Farms v. American Angus Ass'n.*, 379 F. Supp. 1008, 1011 (S.D. Ill.), *aff'd* 506 F.2d 1404 (7th Cir. 1974); *Joseph v. Passaic Hospital Ass'n.*, 118 A.2d 696 (1955); *Blenko v. Schmeltz*, 362 Pa. 365, 20 A.L.R. 2d 523 (1949); *Jackson v. American Yorkshire Club*, 340 F. Supp. 628, 632 (N.D. Iowa 1970). Petitioner therefore submits that the District Court's refusal to receive or consider evidence of the Commissioner's malice toward Mr. Finley, and the Appellate Court's affirmance thereof, constitutes a denial of Petitioner's Due Process right to present evidence and requires the reversal of the judgment for retrial on the issues of irrationality and procedural unfairness.

The Appellate Court affirmed the District Court's multiple exclusions of evidence of malice as being irrelevant by making three completely unfounded observations: (1) Petitioner objected first to evidence of malice, (2) since the subject of malice was covered in Finley's testimony and the Commissioner's deposition the excluded evidence was cumulative, and (3) the District Court made an express finding that the Commissioner had not been motivated by malice. [Op. p. 24.]

Petitioner never objected to evidence of malice but solely to the question whether Finley "considered moving the A's from Kansas City to another city before (he) moved to Oakland," which has no relation whatsoever to the issue of malice. [R.T. 810.] Upon being apprised that Kuhn's counsel was attempting by this question to probe the issue of malice the District Court stated that the malice issue was not "a serious allegation", evidence of it was irrelevant, and authority was "the only (issue) I am going to look at." Petitioner then stated that "we do believe that (malice) is a serious issue and would like permission . . . to explore that matter with Mr. Kuhn." In response, the District Court reiterated for a third time its entirely erroneous ruling that the issue of malice was irrelevant, adding: "that will be my attitude when Mr. Kuhn is on the stand as well." [R.T. 812.]

The admission in evidence of Finley's testimony and Kuhn's deposition did not cure this error, since the District Court made it quite clear *after* that testimony was admitted that *all* evidence of malice would be disregarded as irrelevant. Each of the Court's multiple rulings that the issue of malice was irrelevant and evidence thereon would not be considered was made *after* Finley's testimony was given and *after* Kuhn's

deposition was introduced. [R.T. 810-812; 2003.] In fact, the District Court's final ruling that evidence of malice was irrelevant, by which the Court barred Petitioner from cross-examining the most crucial witness on this issue—the Commissioner himself—was rendered on the last day of trial while the last witness was on the stand. [R.T. 2003.]

Finally, the District Court's finding that "there is *insufficient evidence* . . . to support plaintiff's allegation that the Commissioner's action was . . . motivated by malice" exacerbates rather than excuses the District Court's earlier errors. Of course there was "insufficient evidence . . . to support plaintiff's allegation that the Commissioner's action was . . . motivated by malice." *The District Court created that insufficiency itself by consistently excluding such evidence as irrelevant.* By making this finding the District Court implicitly admitted that its consistent refusal to receive or consider Petitioner's evidence of malice as "irrelevant" precluded Petitioner from proving a material issue in its case and thus constituted prejudicial error.

Most importantly, by consistently refusing to receive or consider evidence on the material issue of malice and then finding that "there is insufficient evidence to support" that allegation, the District Court blatantly denied Petitioner its constitutional right under the Due Process Clause of the 5th Amendment to be heard and to present evidence on all material issues. The Appellate Court's affirmance of the District Court's judgment *because of this finding* compounded this already egregious constitutional error.

The right to present evidence and to confront and cross-examine witnesses is essential to the fair hearing required by the Due Process Clause. *Jenkins v. Mc-*

*Keithan*, 395 U.S. 411, 428-9, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969). Due process mandates that a judicial proceeding give the affected parties an opportunity to be heard on the allegations asserted in the complaint and to present evidence and argument on the contested facts and legal issues framed by the answer to the complaint. *Thompson v. Madison County Bd. of Education*, 476 F.2d 676, 678 (5th Cir. 1973). The submission and determination of a case without giving a party thereto the opportunity of presenting his evidence on a material issue constitutes a denial of due process. *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917); *Evans v. Industrial Accident Comm.*, 71 Cal. App. 2d 244, 249-50, 162 P.2d 488 (1945).

In *Georgia Railway & Electric Co. v. City of Decatur*, 295 U.S. 165, 79 L. Ed. 1365 (1935), this Court held the very same exclusionary ruling rendered by the District Court herein to constitute a denial of the due process right of a civil litigant to be heard on all material issues. In *Georgia* the City of Decatur sued defendant Georgia Railway for the cost of paving the street which abutted defendant's real property. Defendant refused to pay the assessment and defended the suit on the ground that it had not received any benefit from the paving. The trial court consistently excluded evidence that defendant's property was not benefited by the assessment as "irrelevant and immaterial" and rendered judgment, which was affirmed by the Georgia Supreme Court, against defendant. *Id.* at 295 U.S. 168.

This Court reversed the judgment on the ground that the trial court's refusal to receive and consider relevant evidence as "immaterial" constituted a denial

of defendant's due process right to a hearing on that issue:

"No question is raised as to the competency of the proof which was offered, and evidently there is none. The ruling was simply that it was immaterial. But the existence of benefits resulting from the improvement was *material and was deemed so . . . the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process clause of the Constitution.*" *Id.* at 295 U.S. 171. [Emphasis added.]

In the case at bench the District Court consistently refused to receive or consider evidence of malice on the ground it was irrelevant. Yet the District Court, by its finding on the issue of malice, implicitly admitted the issue was material, the Appellate Court explicitly so recognized [Op., p. 37], and universal case law so holds. Thus, the District Court's refusal to receive and consider evidence on the material issue of malice, as affirmed by the Appellate Court, clearly constitutes a denial of Petitioner's due process right to be heard and to present evidence on all material issues.

The concurring opinion's basis for affirming the District Court on this issue—that Petitioner made no offer of proof regarding the Commissioner's malice toward Mr. Finley—is likewise unfounded. [Op., p. 37.] In response to the District Court's ruling that evidence of malice was irrelevant Petitioner's attorney informed the Court that malice "is one of the allegations of the complaint and . . . we are making an offer of proof on that allegation", to which the Court replied

"I understand, that's correct." [R.T. 2003.] Moreover, an offer of proof is not necessary where the record, either from the question asked or otherwise, shows what the substance of the proposed evidence is, as the complaint herein clearly does.<sup>12</sup> *United States v. Alden*, 476 F.2d 378, 381 (7th Cir. 1973). Most importantly, "a specific offer of evidence is not needed where an entire class of evidence has been in advance formally declared inadmissible by the trial court during preliminary argument or colloquy; for the Court's ruling relates forward to all possible offers of evidence and renders them needless." *Greatbreaks v. United States*, 211 F.2d 674, 676 (9th Cir. 1954); Wigmore on Evidence, 3d Ed. §948. [Emphasis *not* added.] Like the case at bench, the class of evidence for which no offer of proof was required in *Greatbreaks* was malice between the parties.

#### **4. The Appellate Court's Affirmance of the District Court's Failure to Find on the Material Issue of Procedural Fairness Requires Reversal.**

Procedural fairness requires a private association (1) not to deny the reasonable expectations of its members by retroactively applying a newly adopted policy to past conduct without providing reasonable notice, and (2) to give a challenged member the opportunity to know exactly what the full charge against him is and to test and meet it if he can in a full, fair and open hearing before an impartial, unbiased decision-

<sup>12</sup>The Complaint specifically alleged that the Commissioner's action "was motivated by malice, prejudice and ill-will toward the Oakland Athletics Baseball Club and its principal owner, Charles O. Finley. Defendant Kuhn's improper and unlawful conduct was the culmination of a prolonged effort to discredit Charles O. Finley . . . and to eliminate Finley from organized baseball." [Complaint, paragraph 15.]

maker who has maintained an open mind until he has heard all the evidence.

The record, the findings of fact, conclusions of law and Judgment Order conclusively demonstrate that the District Court erroneously assumed that the only legal issues in the case were whether the Commissioner's ruling was authorized and whether it had a rational basis. This posture constituted a manifest error of law which resulted in the District Court's failure to recognize, consider and determine the vital issue of whether the Commissioner's ruling was procedurally unfair. Since the evidence on this issue strongly supports Petitioner and must at least be considered in dispute the Appellate Court's affirmance of the District Court's judgment thereon must be reversed. *McClure v. O. Henry Tent & Awning Co.*, 184 F.2d 636, 639 (7th Cir. 1950); *Bank of Madison v. Graber*, 158 F.2d 137, 141 (1946).

The record shows the District Court evidenced its unawareness of the material issue of procedural fairness by repeatedly stating that authority was the only issue it would decide. [R.T. 811-812; 1364; 2001-2003.] The Court further stated that evidence of malice, which was directly relevant to the issue of procedural fairness, was *irrelevant* to the legal issues it would determine. [R.T. 811-812; 2001-2003.] The District Court's subsequent rulings, findings of fact and conclusions of law conclusively demonstrate that it *never* recognized, considered nor decided either aspect of the material issue of procedural fairness. [R.T. 2001-2003; Findings of Fact, Conclusions of Law; March 17, 1977 Judgment Order.] The District Court's error is confirmed by its Judgment Order, in which the Court discussed only the issue of authority and expressly stated:

"The *question* before the court is not whether Bowie Kuhn was wise to do what he did, but rather *whether he had the authority*." [Emphasis added.] [March 17, 1977 Judgment Order, p. 72.]

After the decision Petitioner filed Motions for New Trial and To Amend and Supplement Findings of Fact and Conclusions of Law which apprised the District Court that it had failed to rule on the material issue of procedural fairness and requested specific findings and conclusions on that issue. [Motion for New Trial, p. 7; Motion to Amend and Supplement Findings of Fact, pp. 75-76; Findings No. 77-94 and 113; Conclusions of Law XI, XIV.] Nevertheless, the District Court again disregarded this material issue by denying the motions without opinion. [Order dated April 7, 1977.]

The Appellate Court affirmed despite this failure to find by simplistically stating that "the court responded with adequate findings, many of which we have discussed in this Part III." [Op., p. 24.] The "discussed" findings clearly do not form an adequate basis for an Appellate conclusion that the District Court made a judgment on either aspect of this material issue and that such judgment was substantiated by the evidence and the law. The District Court made no finding nor conclusion that the Commissioner's action was procedurally fair. The District Court made no findings regarding the expectations of the parties or that Kuhn had provided Petitioner with reasonable notice that he might break with established practice and disapprove an assignment in compliance with the Rules. The District Court made no findings that Kuhn gave Petitioner

the opportunity to know what the charge against the assignments was or to meet the charge in a fair hearing, nor that Kuhn had maintained an open mind until hearing all the evidence. The District Court did find that Kuhn did not act out of malice and thus was an unbiased, impartial decision-maker—in outright contradiction to its consistent refusal to receive or consider evidence directly related to that issue as “irrelevant”.

The Appellate Court’s related finding “that anyone becoming a signatory to the Major League Agreement was put on ample notice that the action taken by the Commissioner was not only possible but probable” [Op., p. 23] violated the basic appellate canon that a reviewing court cannot weigh evidence in dispute regarding a material issue on which the District Court failed to find. In making this finding the Appellate Court simply focused on “the broad authority given to the Commissioner by the Major League Agreement” [Op., p. 23] and completely disregarded the evidence that any such authority had lain fallow for fifty-five (55) years, that Commissioner Kuhn had expressly disclaimed having “a right of consent on a contract transfer” four years before, and that prior to June 15, 1976 *everyone* in baseball *expected* that any assignment in compliance with the rules—including one involving star players and a large sum of cash—could be made without interference by the Commissioner. [R.T. 235, 237, 266, 1092-3, 1101, 1508, 1556.] Since a reviewing court cannot weigh evidence in dispute regarding a material issue on which the District Court failed to find but must remand for that purpose [*Holland v. American Steel Foundries*, 190 F.2d 37, 39 (7th Cir. 1951)], the Appellate Court’s “finding” on the notice issue constituted error.

Petitioner therefore submits that the District Court’s complete failure to make any findings of fact or to draw any conclusions of law on the two aspects of procedural fairness, as affirmed, must be reversed and remanded for retrial.

### Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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IVERSON, YOAKUM, PAPIANO & HATCH.

**APPENDIX.**

**Opinion by Judge Sprecher.**

**Judge Fairchild Concurring; Judge Tone Concurring.**

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois 60604.

April 7, 1978.

Before Hon. Thomas E. Fairchild, Chief Judge. Hon. Robert A. Sprecher, Circuit Judge. Hon. Philip W. Tone, Circuit Judge.

Charles O. Finley & Co., Inc., Plaintiff-Appellant, vs. Bowie K. Kuhn, Commissioner of Baseball, et al., Defendants-Appellees. No. 77-2008.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division No. 76-C-2358. Frank J. McGarr, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, **AFFIRMED**, with costs, in accordance with the opinion of this court filed this date.

In the United States Court of Appeals for the Seventh Circuit.

Charles O. Finley & Co., Inc., *Plaintiff-Appellant*, v. Bowie K. Kuhn, et al., *Defendants-Appellees*. No. 77-2008.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76 C 2358—Frank J. McGarr, *Judge*.

Argued February 23, 1978—Decided April 7, 1978.

Before Fairchild, *Chief Judge*, Sprecher and Tone, *Circuit Judges*.

Sprecher, *Circuit Judge*. The two important questions raised by this appeal are whether the Commissioner of baseball is contractually authorized to disapprove player assignments which he finds to be "not in the best interests of baseball" where neither moral turpitude nor violation of a Major League Rule is involved; and whether the provision in the Major League Agreement whereby the parties agree to waive recourse to the courts is valid and enforceable.

I

The plaintiff, Charles O. Finley & Co., Inc., an Illinois corporation, is the owner of the Oakland Athletics baseball club, a member of the American League of Professional Baseball Clubs (Oakland). Joe Rudi, Rollie Fingers and Vida Blue were members of the active playing roster of the Oakland baseball club and were contractually bound to play for Oakland through the end of the 1976 baseball season. On or about June 15, 1976, Oakland and Blue entered a contract whereby Blue would play for Oakland through the 1979 season, but Rudi and Fingers had not at that time signed contracts for the period beyond the 1976 season.

If Rudi and Fingers had not signed contracts to play with Oakland by the conclusion of the 1976 season, they would at that time have become free agents eligible thereafter to negotiate with any major league club,<sup>1</sup> subject to certain limitations on their

<sup>1</sup>On December 23, 1975, an arbitration panel under the 1973 collective bargaining agreement between the baseball club owners and the Players Association had held that players Andy

right to do so that were then being negotiated by the major league clubs with the Players Association.<sup>2</sup>

On June 14 and 15, 1976, Oakland negotiated tentative agreements to sell the club's contract rights for the services of Rudi and Fingers to the Boston Red Sox for \$2 million and for the services of Blue to the New York Yankees for \$1.5 million. The agreements were negotiated shortly before the expiration of baseball's trading deadline at midnight on June 15, after which time Oakland could not have sold the contracts of these players to other clubs without first offering the players to all other American League teams, in inverse order of their standing, at the stipulated waiver price of \$20,000.

The defendant Bowie K. Kuhn is the Commissioner of baseball (Commissioner), having held that position since 1969. On June 18, 1976, the Commissioner disapproved the assignments of the contracts of Rudi, Fingers and Blue to the Red Sox and Yankees "as inconsistent with the best interests of baseball, the integrity of the game and the maintenance of public confidence in it." The Commissioner expressed his concern for (1) the debilitation of the Oakland club, (2) the lessening of the competitive balance of professional baseball through the buying of success by the more affluent clubs, and (3) "the present unsettled circumstances of baseball's reserve system."

Messersmith and Dave McNally were free agents able to negotiate with clubs other than those to which they had previously been contractually bound. On February 11, 1976, the district court ordered the award of the arbitration panel enforced in *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 409 F. Supp. 233 (W.D. Mo.). On March 9, 1976, the Court of Appeals for the Eighth Circuit affirmed the district court in 532 F.2d 615.

<sup>2</sup>Finding of Fact 9. See also footnote 26 *infra*.

Thereafter on June 25, 1976, Oakland instituted this suit principally challenging, as beyond the scope of the Commissioner's authority and, in any event, as arbitrary and capricious, the Commissioner's disapproval of the Rudi, Fingers and Blue assignments. The complaint set forth seven causes of action: (I) that the Commissioner breached his employment contract with Oakland by acting arbitrarily, discriminatorily and unreasonably; (II) that the Commissioner, acting in concert with others, conspired to eliminate Oakland from baseball in violation of federal antitrust laws; (III) that Oakland's constitutional rights of due process and equal protection were violated; (IV) that Oakland's constitutional rights were violated by the first disapproval of a player assignment where no major league rule was violated; (V) that the defendants (the Commissioner, the National and American Leagues and the Major League Executive Council) induced the breach of Oakland's contracts with Boston and New York; (VI) that the Commissioner did not have the authority to disapprove Oakland's assignments "in the best interests of baseball"; and (VII) that Oakland have specific performance of its contracts of assignment with Boston and New York.

On September 7, 1976, the district court granted the Commissioner's motion for summary judgment as to Counts II, III and IV. Count II was dismissed on the ground that the business of baseball is not subject to the federal antitrust laws. Counts III and IV were dismissed on the ground that Oakland did not allege

sufficient nexus between the state and the complained of activity to constitute state action.

A bench trial took place as a result of which judgment on the remaining four counts of the complaint was entered in favor of the Commissioner on March 17, 1977.

On August 29, 1977, the district court granted the Commissioner's counterclaim for a declaratory judgment that the covenant not to sue in the Major League Agreement is valid and enforceable. The court had not relied on that covenant in reaching its two earlier decisions.

Oakland appealed from the judgments of September 7, 1976, March 17, 1977, and August 29, 1977, arguing (1) that the court's failure to issue a finding on the question of procedural fairness constituted error; (2) that the exclusion of evidence of the Commissioner's malice toward the Oakland club constituted error; (3) that other errors were committed during trial; (4) that the antitrust count was not barred by baseball's exemption from federal antitrust law; and (5) that baseball's blanket waiver of recourse to the courts is not enforceable.

## II

Basic to the underlying suit brought by Oakland and to this appeal is whether the Commissioner of baseball is vested by contract with the authority to disapprove player assignments which he finds to be "not in the best interests of baseball." In assessing

the measure and extent of the Commissioner's power and authority, consideration must be given to the circumstances attending the creation of the office of Commissioner, the language employed by the parties in drafting their contractual understanding, changes and amendments adopted from time to time, and the interpretation given by the parties to their contractual language throughout the period of its existence.

Prior to 1921, professional baseball was governed by a three-man National Commission formed in 1903 which consisted of the presidents of the National and American Leagues and a third member, usually one of the club owners, selected by the presidents of the two leagues.<sup>3</sup> Between 1915 and 1921, a series of events and controversies contributed to a growing dissatisfaction with the National Commission on the part of players, owners and the public, and a demand developed for the establishment of a single, independent Commissioner of baseball.<sup>4</sup>

On September 28, 1920, an indictment issued charging that an effort had been made to "fix" the 1919 World Series by several Chicago White Sox players. Popularly known as the "Black Sox Scandal," this event rocked the game of professional baseball and proved the catalyst that brought about the establishment of a single, neutral Commissioner of baseball.<sup>5</sup>

In November, 1920, the major league club owners unanimously elected federal Judge Kenesaw Mountain

<sup>3</sup>Finding of Fact 13. See 2 SEYMOUR, BASEBALL: THE GOLDEN AGE (1971) 9-18.

<sup>4</sup>Finding of Fact 13. See also 2 SEYMOUR, *supra* footnote 3, at 18, 259-273.

<sup>5</sup>Finding of Fact 14. See ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES (1963).

Landis as the sole Commissioner of baseball and appointed a committee of owners to draft a charter setting forth the Commissioner's authority. In one of the drafting sessions an attempt was made to place limitations on the Commissioner's authority. Judge Landis responded by refusing to accept the office of Commissioner.<sup>6</sup>

On January 12, 1921, Landis told a meeting of club owners that he had agreed to accept the position upon the clear understanding that the owners had sought "an authority . . . outside of your own business, and that a part of that authority would be a control over whatever and whoever had to do with baseball."<sup>7</sup> Thereupon, the owners voted unanimously to reject the proposed limitation upon the Commissioner's authority,<sup>8</sup> they all signed what they called the Major League Agreement, and Judge Landis assumed the position of Commissioner. Oakland has been a signatory to the Major League Agreement continuously since 1960.<sup>9</sup> The agreement, a contract between the constituent clubs of the National and American Leagues, is the basic charter under which major league baseball operates.<sup>10</sup>

The Major League Agreement provides that "[t]he functions of the Commissioner shall be . . . to investigate . . . any act, transaction or practice . . . not in the best interests of the national game of Baseball

<sup>6</sup>Findings of Fact 17, 18.

<sup>7</sup>Finding of Fact 18.

<sup>8</sup>Finding of Fact 19. In Spink, Judge Landis and Twenty-Five Years of Baseball (1947) 72, the author says that "Landis agreed to accept if he was given absolute control over baseball."

<sup>9</sup>Finding of Fact 3. See also Finding of Fact 29.

<sup>10</sup>Finding of Fact 5.

and "to determine . . . what preventive, remedial or punitive action is appropriate in the premises, and to take such action. . . ." Art. I, Sec. 2(a) and (b).<sup>11</sup>

The Major League Rules, which govern many aspects of the game of baseball, are promulgated by vote of major league club owners.<sup>12</sup> Major League Rule 12(a) provides that "no . . . [assignment of players] shall be recognized as valid unless . . . approved by the Commissioner."<sup>13</sup>

<sup>11</sup>Art. 1, Sec. 2 provides in part:

The functions of the Commissioner shall be as follows:

(a) TO INVESTIGATE, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball, with authority to summon persons and to order the production of documents, and, in case of refusal to appeal or produce, to impose such penalties as are hereinafter provided.

(b) TO DETERMINE, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League Clubs or individuals, as the case may be.

This language is identical to Art. I, Sec. 2(a) and (b) as originally executed on January 12, 1921, with the exception that the words in present paragraph (a) "not in the best interests of the national game of Baseball" were originally "detrimental to the best interests of the national game of baseball." The change was made in 1964. The district court implied that the change broadened the Commissioner's powers when it found that "previously the Commissioner had to find conduct 'detrimental' to the best interests of baseball in order to take remedial or preventive action . . ." Finding of Fact 28.

<sup>12</sup>Finding of Fact 7.

<sup>13</sup>Finding of Fact 39. A rule of this nature was in effect at least as early as 1931. In *Milwaukee American Ass'n v. Landis*, 49 F.2d 298, 302 (N.D. Ill. 1931), the court noted that "[w]hether there is given to the commissioner the power in so many words to declare Bennett a free agent is immaterial, since the agreements and rules grant to the commissioner juris-

The Major Leagues and their constituent clubs severally agreed to be bound by the decisions of the Commissioner and by the discipline imposed by him. They further agreed to "waive such right of recourse to the courts as would otherwise have existed in their favor." Major League Agreement, Art. VII, Sec. 2.<sup>14</sup>

Upon Judge Landis' death in 1944, the Major League Agreement was amended in two respects to limit the Commissioner's authority. First, the parties deleted the

diction to refuse to approve Bennett's assignment by St. Louis to Milwaukee, and to declare him absolved from the burdens of the same and of his contract with St. Louis."

A federal district judge in another case has expressed his opinion that the present case was correctly decided by the district court on the sole ground that the Commissioner was given specific authority under Major League Rule 12(a) to disapprove contracts and therefore render players free agents. *Atlanta National League Baseball Club, Inc. v. Kuhn*, 432 F.Supp. 1213, 1224 (fn.8), 1225 (N.D. Ga. 1977).

<sup>14</sup>Art. VII, Sec. 2 provides:

The Major Leagues and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed in their favor.

This language is identical to Art. VII, Sec. 1 in the original 1921 agreement. Also, on the same day, January 12, 1921, that the Major League Agreement was signed on behalf of the two major leagues and sixteen baseball clubs, the league presidents and club presidents individually signed the following "Pledge to Support the Commissioner":

We, the undersigned, earnestly desirous of insuring to the public wholesome and high-class baseball, and believing that we ourselves should set for the players an example of the sportsmanship which accepts the umpire's decision without complaint, hereby pledge ourselves loyally to support the Commissioner in his important and difficult task; and we assure him that each of us will acquiesce in his decisions even when we believe them mistaken, and that we will not discredit the sport by public criticism of him or of one another.

provision by which they had agreed to waive their right of recourse to the courts to challenge actions of the Commissioner.<sup>15</sup> Second, the parties added the following language to Article I, Section 3:

No Major League Rule or other joint action of the two Major Leagues, and no action or procedure taken in compliance with any such Major League Rule or joint action of the two Major Leagues shall be considered or construed to be detrimental to Baseball.

The district court found that this addition had the effect of precluding the Commissioner from finding an act that complied with the Major League Rules to be detrimental to the best interests of baseball.<sup>16</sup>

The two 1944 amendments to the Major League Agreement remained in effect during the terms of the next two Commissioners, A.B. "Happy" Chandler and Ford Frick.<sup>17</sup> Upon Frick's retirement in 1964 and in accordance with his recommendation, the parties adopted three amendments to the Major League Agreement: (1) the language added in 1944 preventing the Commissioner from finding any act or practice "taken in compliance" with a Major League Rule to be "detrimental to baseball" was removed;<sup>18</sup> (2) the provisions deleted in 1944 waiving any rights of recourse to the courts to challenge a Commissioner's

<sup>15</sup>The last part of Art. VII, Sec. 2. Footnote 14 *supra*. The parties retained the first part of the section wherein they agreed to be bound by the decisions of the Commissioner and the discipline imposed by him.

<sup>16</sup>Finding of Fact 22.

<sup>17</sup>Finding of Fact 23.

<sup>18</sup>Finding of Fact 26.

decision was restored;<sup>19</sup> and (3) in places where the language "detrimental to the best interests of the national game of baseball" or "detrimental to baseball" appeared those words were changed to "not in the best interests of the national game of Baseball" or "not in the best interests of Baseball."<sup>20</sup>

The nature of the power lodged in the Commissioner by the Major League Agreement is further exemplified "[i]n the case of conduct by organizations not parties to this Agreement, or by individuals not connected with any of the parties hereto, which is deemed by the Commissioner not to be in the best interests of Baseball" whereupon "the Commissioner may pursue appropriate legal remedies, advocate remedial legislation and take such other steps as he may deem necessary and proper in the interests of the morale of the players and the honor of the game." Art. I, Sec. 4.<sup>21</sup>

The Commissioner has been given broad power in unambiguous language to investigate any act, transaction or practice not in the best interests of baseball, to determine what preventive, remedial or punitive action is appropriate in the premises, and to take that action. He has also been given the express power to approve or disapprove the assignments of players. In regard to non-parties to the agreement, he may take such other steps as he deems necessary and proper

<sup>19</sup>Finding of Fact 27.

<sup>20</sup>Finding of Fact 28. See footnote 11 *supra*.

<sup>21</sup>The original 1921 agreement contained substantially the same language except it included the words "conduct detrimental to baseball" instead of "not to be in the best interests of Baseball." See footnote 11 *supra*. There is a reference to Article I, Section 4 in *Milwaukee American Ass'n v. Landis*, 49 F.2d 298, 299 (N.D. Ill. 1931).

in the interests of the morale of the players and the honor of the game. Further, indicative of the nature of the Commissioner's authority is the provision whereby the parties agree to be bound by his decisions and discipline imposed and to waive recourse to the courts.

The Major League Agreement also provides that "[i]n the case of conduct by Major Leagues, Major League Clubs, officers, employees or players which is deemed by the Commissioner not to be in the best interests of Baseball, action by the Commissioner for each offense *may include*" a reprimand, deprivation of a club of representation at joint meetings, suspension or removal of non-players, temporary or permanent ineligibility of players, and a fine not to exceed \$5,000 in the case of a league or club and not to exceed \$500 in the case of an individual. Art. I, Sec. 3.<sup>22</sup>

The district court considered the plaintiff's argument that the enumeration in Article I, Section 3<sup>23</sup> of the

<sup>22</sup>Art. I, Sec. 3 provides:

In the case of conduct by Major League Clubs, officers, employees or players which is deemed by the Commissioner not to be in the best interests of Baseball, action by the Commissioner for each offense may include any one or more of the following: (a) a reprimand; (b) deprivation of a Major League Club of representation in joint meetings; (c) suspension or removal of any officer or employee of a Major League Club; (d) temporary or permanent ineligibility of a player; and (e) a fine, not to exceed Five Thousand Dollars (\$5,000.00) in the case of a Major League or a Major League Club and not to exceed Five Hundred Dollars (\$500.00) in the case of any officer, employee or player.

The original 1921 agreement was substantially the same except that until 1964 (1) it used the phrase "in the case of conduct detrimental to baseball," see footnote 11 *supra*; (2) it described the enumerated forms of action as "punitive action"; and (3) the possibility of assessing a fine against an individual of up to \$500 did not appear in the agreement until 1964.

<sup>23</sup>See footnote 22 *supra*.

sanctions which the Commissioner may impose places a limit on his authority inasmuch as the power to disapprove assignments of players is not included. The court concluded that the enumeration does not purport to be exclusive and provides that the Commissioner *may* act in one of the listed ways without expressly limiting him to those ways.

The court further concluded that the principles of construction that the specific controls the general, or that the expression of some kinds of authority operates to exclude unexpressed kinds, do not apply since the Commissioner is empowered to determine what preventive, remedial or punitive action is appropriate in a particular case and the listed sanctions are punitive only.<sup>24</sup> In fact, from 1921 until 1964, Article I, Section 3, expressly described the enumerated sanctions as "punitive action."<sup>25</sup>

In view of the broad authority expressly given by the Major League Agreement to the Commissioner, particularly in Section 2 of Article I, we agree with the district court that Section 3 does not purport to limit that authority.

### III

Despite the Commissioner's broad authority to prevent any act, transaction or practice not in the best interests of baseball, Oakland has attacked the Commissioner's disapproval of the Rudi-Fingers-Blue transactions on a variety of theories which seem to express a similar thrust in differing language.

<sup>24</sup>The district court said in its judgment order of March 17, 1977: "Nowhere in the Agreement is there a comparable list of the 'preventative' or 'remedial' actions he is empowered to take. Obviously such a list would be impossible to draw in the face of the unpredictability of the problems which arise."

<sup>25</sup>See footnote 22 *supra*.

The complaint alleged that the "action of Kuhn was arbitrary, capricious, unreasonable, discriminatory, directly contrary to historical precedent, baseball tradition, and prior rulings and actions of the Commissioner." In pre-trial answers to interrogatories, Oakland acknowledged that the Commissioner could set aside a proposed assignment of a player's contract "in an appropriate case of violation of [Major League] Rules or immoral or unethical conduct."

It is clear from reading the findings of fact that the district court determined through the course of the trial that Oakland was contending that the Commissioner could set aside assignments only if the assignments involved a Rules violation or moral turpitude.

In its briefs on appeal, Oakland summarized this branch of its argument by stating that the Commissioner's "disapproval of the assignments . . . exceeded [his] authority under the Major League Agreement and Rules; was irrational and unreasonable; and was procedurally unfair." The nub of this diffuse attack seems best expressed in a subsequent heading in the brief that the Commissioner's "abrupt departure from well-established assignment practice and his retroactive application of this change of policy to disapprove [Oakland's] assignments was made without reasonable notice and was therefore procedurally unfair."

The plaintiff has argued that it is a fundamental rule of law that the decisions of the head of a private association must be procedurally fair. Plaintiff then argued that it was "procedurally unfair" for the Commissioner to fail to warn the plaintiff that he would "disapprove large cash assignments of star players even if they complied with the Major League Rules."

In the first place it must be recalled that prior to the assignments involved here drastic changes had commenced to occur in the reserve system and in the creation of free agents.<sup>26</sup> In his opinion disapproving the Rudi, Fingers and Blue assignments, the Commissioner said that "while I am of course aware that there have been cash sales of player contracts in the past, there has been no instance in my judgment which had the potential for harm to our game as do these assignments, particularly in the present unsettled cir-

<sup>26</sup>The following description of the changes in the reserve system appears in *Atlanta National League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1215 (N.D. Ga. 1977):

This system, which essentially bound a player to a team perpetually unless traded or released, was known as the reserve system. In 1975, the Players Association filed grievances on behalf of two players, Andy Messersmith and Dave McNally, challenging this system. An arbitration panel considered the grievances and concluded that players who had completed their last year of a contract with a particular club would be obligated, at the option of the club, to play only one additional year for that club. Unless the player and club signed a new agreement during this "option year," the player became a "free agent," with the right to negotiate contract terms with other major league clubs at the end of the option year season. The decision of the arbitration panel was upheld by the Court of Appeals for the Eighth Circuit in *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n.*, 532 F.2d 615 (8th Cir. 1976).

In an effort to implement the *Kansas City Royals* decision, the representatives of the Players Association and the club owners met to hammer out a new collective bargaining agreement. An agreement was reached in July, 1976 which established a special reentry draft to be conducted in November of each year for those players who had become free agents at the end of a baseball season. Procedures were established for the November draft whereby negotiation rights with each free agent could be drafted by up to twelve teams, each of which were then given negotiation rights for that player. Between the end of the season and three days prior to the draft, however, only the club of record, the team for which the prospective free agent was playing out his option, had negotiation rights with that player.

cumstances of baseball's reserve system and in the highly competitive circumstances we find in today's sports and entertainment world."

Absent the radical changes in the reserve system, the Commissioner's action would have postponed Oakland's realization of value for these players.<sup>27</sup> Given those changes, the relative fortunes of all major league clubs became subject to a host of intangible speculations. No one could predict then or now with certainty that Oakland would fare better or worse relative to other clubs through the vagaries of the revised reserve system occurring entirely apart from any action by the Commissioner.

In the second place, baseball cannot be analogized to any other business or even to any other sport or entertainment. Baseball's relation to the federal antitrust laws has been characterized by the Supreme Court as an "exception," an "anomaly" and an "aberration."<sup>28</sup> Baseball's management through a commissioner is equally an exception, anomaly and aberration, as outlined in Part II hereof. In no other sport or business is there quite the same system, created for quite the same reasons and with quite the same underlying policies. Standards such as the best interests of baseball,<sup>29</sup> the interests of the morale of the players and the honor of the game,<sup>30</sup> or "sportsmanship which accepts

<sup>27</sup>This realization of value could come in the form of subsequent player transactions involving less cash but some returning-player value, or in box office profits attributable to these players, or possibly in the aggregate value of the club if and when eventually sold as a franchise and team.

<sup>28</sup>*Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

<sup>29</sup>Major League Agreement, Article I, Sections 2(a), 3, 4.

<sup>30</sup>Major League Agreement, Article I, Section 4.

the umpire's decision without complaint,"<sup>31</sup> are not necessarily familiar to courts and obviously require some expertise in their application. While it is true that professional baseball selected as its first Commissioner a federal judge,<sup>32</sup> it intended only him and not the judiciary as a whole to be its umpire and governor.

As we have seen in Part II, the Commissioner was vested with broad authority and that authority was not to be limited in its exercise to situations where Major League Rules or moral turpitude was involved. When professional baseball intended to place limitations upon the Commissioner's powers, it knew how to do so. In fact, it did so during the 20-year period from 1944 to 1964.

The district court found and concluded that the Rudi-Fingers-Blue transactions were not, as Oakland had alleged in its complaint, "directly contrary to historical precedent, baseball tradition, and prior rulings." During his almost 25 years as Commissioner, Judge

<sup>31</sup>The original "Pledge to Support the Commissioner," see footnote 14 *supra*.

<sup>32</sup>Judge Kenesaw Mountain Landis was 38 years old when President Theodore Roosevelt appointed him to the United States District Court for the Northern District of Illinois in 1905. When he accepted the office of Commissioner of baseball in November 1920, he continued in his judicial post which provoked heavy criticism from Congress, the American Bar Association and the press. Landis finally sent his judicial resignation to President Harding in February 1922, to become effective March 1, after having held both positions for more than 15 months. He served as baseball Commissioner for almost 25 years until his death on November 25, 1944. 2 VOIGHT, AMERICAN BASEBALL (1970) 141-150; 2 SEYMOUR, BASEBALL: THE GOLDEN AGE (1971) 367-372; ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES (1963) 223-224; MACKENZIE, THE APPEARANCE OF JUSTICE (1974) 180-182.

Landis found many acts, transactions and practices to be detrimental to the best interests of baseball in situations where neither moral turpitude nor a Major League Rule violation was involved, and he disapproved several player assignments.<sup>33</sup>

On numerous occasions since he became Commissioner of baseball in February 1969, Kuhn has exercised broad authority under the best interests clause of the Major League Agreement. Many of the actions taken by him have been in response to acts, transactions or practices that involved neither the violation of a Major League Rule nor any gambling, game-throwing or other conduct associated with moral turpitude. Moreover, on several occasions Commissioner Kuhn has taken broad preventive or remedial action with respect to assignments of player contracts.<sup>34</sup>

On several occasions Charles O. Finley, the principal owner of the plaintiff corporation and the general manager of the Oakland baseball club, has himself espoused that the Commissioner has the authority to exercise broad powers pursuant to the best interests clause, even where there is no violation of the Major League Rules and no moral turpitude is involved.<sup>35</sup>

Twenty-one of the 25 parties to the current Major League Agreement who appeared as witnesses in the district court testified that they intended and they presently understand that the Commissioner of baseball can review and disapprove an assignment of a player contract which he finds to be not in the best interests

<sup>33</sup>Finding of Fact 21.

<sup>34</sup>Finding of Fact 30. For examples of such actions, see Findings of Fact 31, 32, 33, 34, 35, 36.

<sup>35</sup>Finding of Fact 43. For examples of such occasions, see Findings of Fact 44, 45, 46.

of baseball, even if the assignment does not violate the Major League Rules and does not involve moral turpitude.<sup>36</sup> Oakland contended that the district court erred in admitting this testimony since parties are bound "only by their objective manifestations and their subjective intent is immaterial." In this bench trial where Oakland was contending that it was not put on notice that transactions alleged to otherwise conform to the Major League Rules might be invalidated, the court could certainly consider what most of the current parties to the agreement believed they were put on notice of when they became signatories.

Oakland relied upon Major League Rule 21, which deals, in Oakland's characterization of it, with "(a) throwing or soliciting the throwing of ball games, (b) bribery by or of players or persons connected with clubs or (c) umpires, (d) betting on ball games, and (e) physical violence and other unsportsmanlike conduct" as indicating the limits of what is "not in the best interests of baseball." However, Rule 21(f) expressly states:

Nothing herein contained shall be construed as exclusively defining or otherwise limiting acts, transactions, practices or conduct not to be in the best interests of Baseball; and any and all other acts, transactions, practices or conduct not to be in the best interests of Baseball are prohibited, and shall be subject to such penalties including permanent ineligibility, as the facts in the particular case may warrant.

Oakland also took issue with language in the district court's judgment order of March 17, 1977, which relied

<sup>36</sup>Finding of Fact 37.

upon *Milwaukee American Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).<sup>37</sup> Oakland contended that the *Landis* case was distinguishable inasmuch as it involved the violation of a certain rule. In that case Judge Lindley held that the Commissioner "acted clearly within his authority" when he disapproved a player assignment after several assignments of the same player to and from different clubs owned by a single individual. The court said in 49 F.2d at 302:<sup>38</sup>

Though there is nothing in the rules to prohibit an individual owning control of a Major League club from likewise owning control of Minor League clubs, the intent of the code is such that common ownership is not to be made use of as to give one individual, controlling all of the clubs mentioned, the absolute right, independent of other clubs, to control indefinitely a player acquired and switched about by apparent outright purchases.

We conclude that the evidence fully supports, and we agree with, the district court's finding that "[t]he history of the adoption of the Major League Agreement in 1921 and the operation of baseball for more than 50 years under it, including: the circumstances preceding and precipitating the adoption of the Agreement;

<sup>37</sup>The district court said: "Many years ago, in the case of *Milwaukee American Association v. Landis*, . . . the court determined this same issue in this same manner. From that date to this, if the signatories to the Major League Agreement had wished to bar the Commissioner from their property rights in players' contracts, it has always been and still remains within their power to do so. They have not."

<sup>38</sup>The *Landis* court also said at 301: "The parties endowed the commissioner with wide power and discretion . . . of his own initiative to observe, investigate and take such action as necessary to secure observance of the provisions of the agreements and rules, promotion of the expressed ideals of and prevention of conduct detrimental to, baseball."

the numerous exercises of broad authority under the best interests clause by Judge Landis and . . . Commissioner Kuhn; the amendments to the Agreement in 1964 restoring and broadening the authority of the Commissioner; . . . and most important the express language of the Agreement itself—are all to the effect that the Commissioner has the authority to determine whether *any* act, transaction or practice is 'not in the best interests of baseball,' and upon such determination, to take whatever preventive or remedial action he deems appropriate, whether or not the act, transaction or practice complies with the Major League Rules or involves moral turpitude."<sup>39</sup> Any other conclusion would involve the courts in not only interpreting often complex rules of baseball to determine if they were violated but also, as noted in the *Landis* case, the "intent of the [baseball] code," an even more complicated and subjective task.

The Rudi-Fingers-Blue transactions had been negotiated on June 14 and 15, 1976. On June 16, the Commissioner sent a teletype to the Oakland, Boston and New York clubs and to the Players' Association expressing his "concern for possible consequences to the integrity of baseball and public confidence in the game" and setting a hearing for June 17. Present at the hearing were 17 persons representing those notified. At the outset of the hearing the Commissioner stated that he was concerned that the assignments would be harmful to the competitive capacity of Oakland; that they reflected an effort by Boston and New York to purchase star players and "bypass the usual methods of player development and acquisition which

<sup>39</sup>Finding of Fact 47.

have been traditionally used in professional baseball"; and that the question to be resolved was whether the transactions "are consistent with the best interests of baseball's integrity and maintenance of public confidence in the game." He warned that it was possible that he might determine that the assignments not be approved. Mr. Finley and representatives of the Red Sox and Yankees made statements on the record.

No one at the hearing, including Mr. Finley, claimed that the Commissioner lacked the authority to disapprove the assignments, or objected to the holding of the hearing, or to any of the procedures followed at the hearing.<sup>40</sup>

On June 18, the Commissioner concluded that the attempted assignments should be disapproved as not in the best interests of baseball. In his written decision, the Commissioner stated his reasons which we have summarized in Part I. The decision was sent to all parties by teletype.<sup>41</sup>

The Commissioner recognized "that there have been cash sales of player contracts in the past," but concluded that "these transactions were unparalleled in the history of the game" because there was "never anything on this scale or falling at this time of the year, or which threatened so seriously to unbalance the competitive balance of baseball."<sup>42</sup> The district court concluded that the attempted assignments of Rudi, Fingers and Blue "were at a time and under circumstances making them unique in the history of baseball."<sup>43</sup>

<sup>40</sup>Finding of Fact 49.

<sup>41</sup>Finding of Fact 50.

<sup>42</sup>Finding of Fact 51; Tr. 1867.

<sup>43</sup>Finding of Fact 52.

We conclude that the evidence fully supports, and we agree with, the district court's finding and conclusion that the Commissioner "acted in good faith, after investigation, consultation and deliberation, in a manner which he determined to be in the best interests of baseball" and that "[w]hether he was right or wrong is beyond the competence and the jurisdiction of this court to decide."<sup>44</sup>

We must then conclude that anyone becoming a signatory to the Major League Agreement was put on ample notice that the action ultimately taken by the Commissioner was not only possible but probable. The action was neither an "abrupt departure" nor a "change of policy" in view of the contemporaneous developments taking place in the reserve system, over which the Commissioner had little or no control,<sup>45</sup> and in any event the broad authority given to the Commissioner by the Major League Agreement placed any party to it on notice that such authority could be used.

Oakland has argued that the district court erred in not finding on the issue of procedural fairness. To the extent that Oakland made this an issue during

<sup>44</sup>Finding of Fact 55. *See also* Finding of Fact 53:

It is beyond the province of this court to consider the wisdom of the Commissioner's reasons for disapproving the assignments of Rudi, Blue and Fingers. There is insufficient evidence, however, to support plaintiff's allegation that the Commissioner's action was arbitrary or capricious, or motivated by malice, ill will or anything other than the Commissioner's good faith judgment that these attempted assignments were not in the best interests of baseball. The great majority of persons involved in baseball who testified on this point shared Commissioner Kuhn's view.

<sup>45</sup>Oakland has not expressly argued that the Commissioner's notice of hearing, the hearing itself, or his written decision  
(This footnote is continued on next page)

the course of the trial, the court responded with adequate findings, many of which we have discussed in this Part III.

Finally, Oakland has also argued that the court excluded evidence which tended to show the Commissioner's malice toward Mr. Finley. Finley's own testimony on this subject, as well as the Commissioner's deposition covering the subject, were admitted as part of the record. When counsel for the Commissioner attempted to cross-examine Finley in regard to the same subject, Oakland's counsel objected on the ground of relevancy and the court sustained the objection on the ground that the Commissioner's motivation was not a serious issue in the case.<sup>46</sup> When the Commissioner was being cross-examined the same objection was sustained. However, since the subject had not been covered in direct examination, the court in its discretion could restrict the cross-examination to the scope of the direct; and since the subject of malice and motivation had been covered in Finley's testimony and in the Commissioner's deposition, the court could exclude it as cumulative regardless of its relevancy. The court made an express finding that the Commissioner had not been motivated by malice.<sup>47</sup>

with express reasons were procedurally unfair, but only that Oakland was not put on notice of a changed policy and that the Commissioner bore malice toward Finley.

<sup>46</sup>Tr. 811:

The Court: Well, it [motivation of the Commissioner] is one [allegation of the complaint] that the testimony thus far has not really supported and I don't think it is a serious allegation. I don't take it seriously. I am not interested in whether the Commissioner likes Mr. Finley or whether he doesn't. If he had the authority to do what he did, we have a legal issue, and that is the only one I am going to look at, so I will sustain the objection.

<sup>47</sup>Finding of Fact 53. See footnote 44 *supra*.

#### IV

The district court granted the defendant's motion for summary judgment as to Count II of the complaint, which sought to establish a violation of the Sherman Antitrust Act. The court said that "Baseball, anomaly of the antitrust law, is not subject to the provisions of that Act." The plaintiff on appeal has argued that any exemption which professional baseball might enjoy from federal antitrust laws applies only to the reserve system.<sup>48</sup>

The reserve system "centers in the uniformity of player contracts; the confinement of the player to the club that has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum."<sup>49</sup>

The Supreme Court has held three times that "the business of baseball" is exempt from the federal antitrust laws.

In *Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200, 208 (1922), Mr. Justice Holmes said that "[t]he business is giving exhibitions of baseball, which are purely state affairs."

<sup>48</sup>The plaintiff relies principally upon two quotations from Mr. Justice Blackmun's opinion for the Supreme Court in *Flood v. Kuhn*, 407 U.S. 258 (1972):

For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.  
*Id.* at 259.

With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly.  
*Id.* at 282.

<sup>49</sup>*Flood v. Kuhn*, 407 U.S. 258, 259, fn. 1 (1972). See also footnote 26 *supra*.

In *Toolson v. New York Yankees*, 346 U.S. 356, 356-57 (1953), the Court said in a short per curiam opinion:

In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, . . . this Court held that *the business of providing public baseball games for profit between clubs of professional baseball players* was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring *such business* under these laws by legislation having prospective effect. *The business* has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, *supra*, so far as that decision determines that Congress had no intention of including *the business of baseball* within the scope of the federal antitrust laws.

(Emphasis added).

In *Flood v. Kuhn*, 407 U.S. 258, 282, 284 (1972), the Court said that "Professional baseball is a business and it is engaged in interstate commerce" and "we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball."

Finally, in holding that the antitrust laws do apply to "the business of professional football," the Supreme Court, speaking through Mr. Justice Clark, made a substantive pronouncement regarding the baseball cases in *Radovich v. National Football League*, 352 U.S. 445, 451 (1957):

. . . [S]ince *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, *i.e.*, the business of organized professional baseball.

Despite the two references in the *Flood* case to the reserve system,<sup>50</sup> it appears clear from the entire opinions in the three baseball cases, as well as from *Radovich*, that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws.<sup>51</sup>

## V

Following the bench trial, the district court reached its decision in favor of the Commissioner without considering the impact of Article VII, Section 2 of the Major League Agreement, wherein the major league baseball clubs agreed to be bound by the Commissioner's decisions and discipline and to waive recourse to the courts.<sup>52</sup> In Parts II and III, we have affirmed

<sup>50</sup>See footnote 48 *supra*.

<sup>51</sup>We recognize that this exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball. See, *e.g.*, *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd on other grounds*, 512 F.2d 1264 (9th Cir. 1975).

<sup>52</sup>See footnote 14 *supra*.

the March 17, 1977, judgment, also without considering the impact of Article VII, Section 2. In this part we consider the district court's judgment of August 29, 1977, granting the Commissioner's counterclaim for a declaratory judgment that the waiver of recourse clause is valid and enforceable.

The Commissioner's counterclaim was based upon diversity of citizenship jurisdiction. In diversity cases a federal court must follow the conflict of laws principles prevailing in the state in which it sits. *Klaxon Company v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Under Illinois conflict of law principles, the law of the place of performance governs the construction and obligations of the contract when the place of making and place of performance differ, if the agreement is to be wholly performed in one jurisdiction. If more than one place of performance is involved, the place of making of the contract governs its construction and obligations. *Oakes v. Chicago Fire Brick Co.*, 388 Ill. 474, 58 N.E.2d 460 (1944); *P.S.&E., Inc. v. Selastomer Detroit, Inc.*, 470 F.2d 125, 127 (7th Cir. 1972). The Major League Agreement was and is to be performed in more than one state so that we are directed to its place of making.

The original agreement including Article VII, Section 2,<sup>53</sup> was made at Chicago, Illinois on January 12, 1921.<sup>54</sup>

<sup>53</sup>In the original agreement it was Section 1 of Article VII. See footnote 14 *supra*.

<sup>54</sup>The original agreement was to remain in force for 25 years (until January 12, 1946). Exs. K-3 and K-8. It was amended on December 12, 1944, February 3, 1945, November 1, 1946, August 1, 1960 and January 1, 1975. On February 3, 1945, the termination date was extended to January 1,

Oakland has urged us to apply the substantive law dealing with the "policies and rules of a private association" to the Major League Agreement and actions taken thereunder.<sup>55</sup> Illinois has developed a considerable body of law dealing with the activities of private voluntary organizations<sup>56</sup> and we agree that the validity and effect of the waiver of recourse clause should initially be tested under these decisions.

Even in the absence of a waiver of recourse provision in an association charter, "[i]t is generally held that courts . . . will not intervene in questions involving the enforcement of bylaws and matters of discipline in voluntary associations." *American Federation of Technical Engineers v. La Jeunesse*, 63 Ill.2d 263, 347 N.E.2d 712, 715 (1976). In *La Jeunesse* the Illinois Supreme Court held that a private association could not bring suit to enforce fines imposed against some of its members. Thus the court upheld the rule that the courts are generally not available to an association or its members to review actions of a voluntary

1970; on August 1, 1960, the date was extended to January 1, 1975; and on January 1, 1975, it was extended to January 1, 1980. Exs. B-49, B-50, K-1 and K-50.

<sup>55</sup>Plaintiff's Brief, page 30. See generally Plaintiff's Brief, pages 28-38 and Plaintiff's Reply Brief, pages 26-27. Concerning the law governing the activities of private associations, see *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 1011 (1967); *Judicial Annulment of Expulsion From Private Associations*, 60 NW. U.L. REV. 241 (1965).

<sup>56</sup>See, e.g., *American Federation of Technical Engineers v. La Jeunesse*, 63 Ill.2d 263, 347 N.E.2d 712 (1976); *Van Daele v. Vinci*, 51 Ill.2d 389, 282 N.E.2d 728, cert. denied, 409 U.S. 1007 (1972); *Engel v. Walsh*, 258 Ill. 98, 101 N.E. 222 (1913); *Pacaud v. Waite*, 218 Ill. 138, 75 N.E. 779 (1905); *People v. Order of Foresters*, 162 Ill. 78, 44 N.E. 401 (1896); *Board of Trade v. Nelson*, 162 Ill. 431, 44 N.E. 743 (1896); *Rice v. Board of Trade*, 80 Ill. 134 (1875).

association with respect to its own members. *Accord, Engel v. Walsh*, 258 Ill. 98, 101 N.E. 222 (1913); *Werner v. International Association of Machinists*, 11 Ill. App.2d 258, 137 N.E.2d 100 (1956).

Viewed in light of these decisions, the waiver of recourse clause contested here seems to add little if anything to the common law nonreviewability of private association actions. This clause can be upheld as coinciding with the common law standard disallowing court interference. We view its inclusion in the Major League Agreement merely as a manifestation of the intent of the contracting parties to insulate from review decisions made by the Commissioner concerning the subject matter of actions taken in accordance with his grant of powers.<sup>57</sup>

A second situation in which the waiver of recourse clause must be tested is in conjunction with the provision immediately preceding it which provides that "[a]ll disputes and controversies related in any way to professional baseball between clubs . . . shall be submitted to the Commissioner, as Arbitrator who, after hearing, shall have the sole and exclusive right to decide such disputes and controversies." Art. VII, Sec. 1. These clauses combine to place the Commissioner in the role of binding arbitrator *between disputing parties* as compared to his power to act upon his own initiative in the best interests of baseball as in the present case.

Considering the waiver of recourse clause in its function of requiring arbitration by the Commissioner, its validity cannot be seriously questioned. Illinois has

<sup>57</sup>See Part II of this opinion for a discussion of the historical development and present extent of the Commissioner's powers.

adopted the Uniform Arbitration Act allowing contracting parties to require that all existing and future disputes be determined by arbitration.<sup>58</sup> Illinois is joined by numerous other states in encouraging a policy of arbitration, thereby providing private resolution of disputes and reducing litigation.<sup>59</sup> Moreover, it has been made clear that the United States Arbitration Act, 9 U.S.C. §§ 1-14, provides for arbitration of future disputes concerning contracts evidencing transactions in interstate commerce and that this federal law controls state law to the contrary. *Prime Paint v. Flood & Conklin*, 388 U.S. 395 (1967); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972). The federal courts have also upheld provisions in private agreements to waive all review of an arbitrator's decision. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Rossi v. TWA*, 507 F.2d 404 (9th Cir. 1974), *aff'd* 350 F. Supp. 1263 (C.D. Cal. 1972); *Euzzino v. London & Edinburg Insurance Co.*, 228 F. Supp. 431 (N.D. Ill. 1964). We conclude that the waiver of recourse clause is valid when viewed as requiring binding arbitration by the Commissioner for disputes between clubs.

Even if the waiver of recourse clause is divorced from its setting in the charter of a private, voluntary

<sup>58</sup>ILL. REV. STAT. ch. 10, § 101 *et seq.* Section 101 provides in part:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable. . . .

<sup>59</sup>At least twenty states have codified this policy by adopting the Uniform Arbitration Act. Adopting states include Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, North Carolina, South Dakota, Texas and Wyoming.

association and even if its relationship with the arbitration clause in the agreement is ignored, we think that it is valid under the circumstances here involved. Oakland claims that such clauses are invalid as against public policy.<sup>60</sup> This is true, however, only under circumstances where the waiver of rights is not voluntary, knowing or intelligent, or was not freely negotiated by parties occupying equal bargaining positions. The trend of cases in many states<sup>61</sup> and in the federal courts<sup>62</sup> supports the conclusion of the district court

<sup>60</sup>See, e.g., *McCullough v. Clinch-Mitchell Const. Co.*, 71 F.2d 17 (8th Cir. 1934); *General Motors Acceptance Corp. v. Talbott*, 38 Idaho 13, 219 P. 1058 (1923) (in violation of state statute); *Progressive Finance and Realty Co. v. Stempel*, 231 Mo. App. 721, 95 S.W.2d 834 (1933) (arbitration of future disputes involved).

<sup>61</sup>Waiver of recourse clauses rarely appear in the absence of an association charter or an agreement to arbitrate. Indeed, the waiver of recourse clause presented here must be viewed in light of the totality of circumstances presented, wherein private contractual recourse remedies are provided. For cases upholding waiver of recourse or similar clauses, see *Orkin Exterminating Co. v. Stevens*, 130 Ga. App. 363, 203 S.E.2d 587, 593 (1973) ("There is no generally applicable rule of law forbidding one contracting party from waiving all recourse in the event of breach by the other."); *Laub v. Genway Corp.*, 60 F.R.D. 462 (S.D.N.Y. 1973) (Contractual agreement not to assert counterclaims valid in New York); *Kiewit Sons' Co. v. Iowa Southern Utilities Co.*, 355 F. Supp. 376 (S.D. Iowa 1973) ("No damage" clause will be regarded as valid and enforceable); *Seufert Land Co. v. Greenfield*, 496 P.2d 197 (Ore. 1972) (Waiver of all defenses in contract valid); *Park v. Board of Trustees*, 21 Cal. App.3d 630, 98 Cal. Rptr. 859 (1971) (Judicial review of pension plan board of trustees precluded); *Rossum v. Jones*, 97 N.J. Super 382, 235 A.2d 206 (1967) (Covenant not to sue valid); *School District No. 46 v. Del Bianco*, 68 Ill. App.2d 145, 215 N.E.2d 25, 31 (1966) ("Arbitration—as settlements, releases and covenants not to sue—simply removes controversies from the area of litigation [and] . . . is looked upon with favor by federal, state and common law.").

<sup>62</sup>In *O.H. Overmyer v. Frick*, 405 U.S. 174, 184 (1972), the Court upheld a cognovit note authorized by state law as constitutional under the Fourteenth Amendment where "a

under the circumstances presented here that "informed parties, freely contracting, may waive their recourse to the court."<sup>63</sup>

Although the waiver of recourse clause is generally valid for the reasons discussed above, we do not believe that it forecloses access to the courts under all circumstances. Thus, the general rule of nonreviewability which governs the actions of private associations is subject to exceptions 1) where the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the charter or bylaws of the association<sup>64</sup> and 2) where the association has failed to follow the basic rudiments of due process of law.<sup>65</sup> Similar exceptions exist for

party gives up in advance his constitutional right to defend any suit by the other." The Court said that a voluntary, intelligent and knowing waiver of rights is valid. Similarly, *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), upheld a private contractual agreement not to sue in any court other than the High Court of Justice in London. The Court declared that this choice "was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.* at 12. Certainly this rationale applies to the instant case. See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), where the Court approved an agreement waiving review of an arbitrator's decision.

<sup>63</sup>Memorandum Opinion and Order of August 29, 1977, page 2.

<sup>64</sup>See, e.g., *Ryan v. Cudahy*, 157 Ill. 108, 41 N.E. 760 (1895); *Allen v. Chicago Undertakers' Ass'n*, 137 Ill. App. 61 (1907), *aff'd*, 232 Ill. 458, 83 N.E. 952 (1908).

<sup>65</sup>While "[s]trict adherence to judicial standards of due process would be arduous and might seriously impair the . . . proceedings of voluntary associations," *Van Daele v. Vinci*, 51 Ill.2d 389, 282 N.E.2d 728, 732 (1972), the procedure must not be a sham designed merely to give colorable propriety to an inadequate process. Compare *Virgin v. American College of Surgeons*, 42 Ill. App.2d 352, 192 N.E.2d 414 (1963) with *Parsons College v. North Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967).

avoiding the requirements of arbitration under the United States Arbitration Act.<sup>66</sup> We therefore hold that, absent the applicability of one of these narrow exceptions, the waiver of recourse clause contained in the Major League Agreement is valid and binding on the parties and the courts.

We affirm the district court's judgments of September 7, 1976, March 17, 1977 and August 29, 1977.<sup>67</sup>

AFFIRMED.

<sup>66</sup>9 U.S.C. § 10.

<sup>67</sup>Defendants-Appellees' Motion to Strike Plaintiff-Appellants' Reply Brief is denied.

FAIRCHILD, *Chief Judge*, concurring. Jurisdiction, both of the Finley claim that the actions of the Commissioner were not authorized by the Major League Agreement and of the Commissioner's counterclaim based on the waiver of recourse to the courts provision, is predicated on diversity of citizenship. To the extent that this is a diversity action, the course of law rules of the State of Illinois are controlling. Under Illinois choice of law decisions, the law of the place of formation governs where the contract is to be performed in more than one state. Because the contract was made in Illinois and performance is nationwide, Illinois law governs the contract issues: whether the actions of the Commissioner are authorized by the Agreement, and whether the waiver of recourse provision is valid.

With respect to whether the actions of the Commissioner were authorized by the Major League Agreement, the first question is whether the Agreement gives the Commissioner the power to void player assignments when no rules have been violated. This question, like the analogous question of determining when a grievance is arbitrable, requires a judicial interpretation of the contract. Two contractual bases exist for the Commissioner's action. Major League Rule 12(a) provides that no assignment of a player contract is valid until "approved by the Commissioner." More generally, Art. I, Sec. 2 of the Agreement states that the Commissioner shall have the power to investigate any act "suspected to be not in the best interests of . . . baseball" and to take whatever "preventative, remedial or punitive action is appropriate . . . ." Neither of these provisions in any way expressly limits the power of the Commissioner to situations involving rules violations. In my

view, Finley has simply failed to establish that these provisions bestowing broad discretionary powers upon the Commissioner were intended by the parties only to apply in cases of rules violations.<sup>1</sup> Certainly the history carefully summarized in Judge Sprecher's opinion does not demonstrate that such a limitation was intended.

Once it is established that the Commissioner has the power under the contract to invalidate player assignments absent rules violations, the next problem is determining the standard of review applicable to the Commissioner's actions. Under Illinois law, this standard of review is extremely limited. In Illinois, courts will not as a general rule review the decisions of the governing body of a private association, *e.g.*, *American Federation of Technical Engineers v. La Jeunesse*, 63 Ill.2d 263, 347 N.E.2d 712, 715 (1976); *Van Daele v. Vinci*, 51 Ill.2d 389, 282 N.E.2d 728, 731 (1972); *Engel v. Walsh*, 258 Ill. 98, 101 N.E. 222, 223 (1913). This is particularly true where, as here, the parties have voluntarily given the Commissioner such broad authority. The waiver of recourse to the courts provision strongly emphasizes the limited scope of judicial review intended by the parties of the Commissioner's actions. I agree with the suggestion in Judge Sprecher's opinion

<sup>1</sup>I do not agree with the majority, however, that it was not error for the district court to admit testimony of twenty-one of the parties to the Major League Agreement regarding their understanding concerning the authority of the Commissioner. The uncommunicated intentions and understandings of parties to a contract are inadmissible to establish their earlier intent at the time of contract formation. *E.g.*, *Union Bank v. Winnebago Industries, Inc.*, 527 F.2d 95, 99 (9th Cir. 1975). I do not believe Finley was prejudiced by this error, however, in light of the unambiguous contractual language, the fact that the trial was held without a jury, and the judge's statement that he would give minimal weight to the testimony.

that the inclusion of the clause merely emphasizes the limited scope of review which would obtain in any event.

I would not, however, proceed with the majority to the more sweeping holding that the waiver of recourse to the courts provision, unless narrow exceptions exist, is "valid and binding on the parties and the courts" [presumably where Illinois law is found to control]. While the Illinois case law is sparse, the latest judicial pronouncement on the subject strongly suggests that waiver of recourse to courts provisions are unenforceable and void in Illinois.<sup>2</sup>

While the scope of review of the Commissioner's decision is extremely narrow, I believe it could be overturned if Finley could establish that he was denied a fair hearing because the Commissioner was biased or motivated by malice. *Van Daele v. Vinci*, *supra*, 347 N.E.2d at 732. *La Jeunesse*, *supra*, 347 N.E.2d at 715, *Engel v. Walsh*, *supra*, 101 N.E. at 2. The district court, however, made express findings that Finley received a fair hearing and the Commissioner was not motivated by malice. The finding does not seem to me to be clearly erroneous. Such problems as there are with the finding arise out of comments by the

<sup>2</sup>In *In re Streck's Estate*, 35 Ill. App. 473, 183 N.E.2d, 31 (1962), the court stated:

Agreements whose object is to oust the jurisdiction of the courts are contrary to public policy and void.

The one Illinois case cited by the majority in support of its upholding the waiver of recourse to the courts provision, *School District No. 46 v. Del Bianco*, 68 Ill. App.2d 145, 215 N.E.2d 25 (1966), involved a contract for arbitration. Public policy in that area had been pronounced by the legislature in the Uniform Arbitration Act. The Act does not completely foreclose recourse to the courts, since fraud and the grounds for vacating an award are recognized.

court implying that malice of the Commissioner would be irrelevant, and the court's sustaining of objections to some of the questions concerning possible ill will. Notwithstanding the comments, the court did make the finding, and did hear some of the evidence. In the absence of an offer of proof it is hard to believe that the sustaining of the objections was prejudicial. Moreover, appellant had made no objection to the proceeding before the Commissioner on the ground of bias.

I concur in Part IV of the majority opinion holding that baseball's exemption from the antitrust laws is not limited to the reserve clause. I only add that *Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200 (1922), the case establishing the exemption, did not involve the reserve clause. See discussion, *State v. Milwaukee Braves, Inc.*, 31 Wis. (2d) 699, 722-725, 144 N.W.2d 1 (1966), *cert. denied sub nom. Wisconsin v. Milwaukee Braves, Inc.*, 385 U.S. 990.

TONE, *Circuit Judge*, concurring. With respect to the testimony of the 21 owners as to their understanding of the meaning of the Major League Agreement, I read Judge Sprecher's opinion as holding that testimony admissible on the issue of notice, not on the issue of their intent at the time of contract formation. The uncommunicated intent of a party to a contract is not admissible on the issue of the meaning of the contract. (See, in addition to the *Union Bank* case

cited by Judge Fairchild, Judge Learned Hand's statement in *Hotchkiss v. National City Bank*, 200 Fed. 287, 293-294 (S.D.N.Y. 1911), *aff'd* 201 Fed. 664 (2d Cir. 1911).) Here, however, appellant argues that the Commissioner's action was an "abrupt departure from well established assignment practice and his retroactive application of the change of policy to disapprove appellant's assignments was made without reasonable notice and was therefore procedurally unfair"; and that "the reasonable expectations of a member of a private association may not be denied by a retroactive ruling lacking reasonable notice." It is to be remembered that

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 401, Fed. R. Evid. The understanding of the other owners over a period of many years concerning the Commissioner's authority tended to make less probable the alleged facts on which appellant based the argument of lack of reasonable notice, *viz.*, the existence of the asserted "well established assignment practice" that was changed contrary to appellant's "reasonable expectations." There was other, more probative evidence, including actual exercises of authority inconsistent with the asserted practice and conduct of appellant's president indicating an opinion consistent with that of the 21 other owners, that made the challenged evidence cumulative but not inadmissible unless the judge exer-

cised his discretion under Rule 403, Fed. R. Evid., to exclude it.

Because the evidence was admissible on the notice issue, error could lie only in considering it on the interpretation issue, on which it was not admissible. Any such error was harmless, because neither the district judge's interpretation of the agreement nor ours depends upon the challenged evidence.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit*

United States District Court, Northern District of Illinois, Eastern Division.

Name of Presiding Judge, Honorable Frank J. McGarr.

Cause No. 76 C 2358.

Date 9/7/76.

Title of Cause CHARLES O. FINLEY & CO., INC. v. BOWIE K. KUHN, etc., et al.

Brief Statement of Motion.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel.

Representing.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk.

Pursuant to memorandum opinion and order entered this day, defendant Kuhn's Motion for Summary Judgment is granted to the extent that Counts II, III and IV are dismissed, and denied in all other respects.—  
DRAFT.

/s/ McGarr, J.

**Memorandum Opinion and Order.**

In the United States District Court, for the Northern District of Illinois, Eastern Division.

Charles O. Finley & Co., Inc., an Illinois corporation, Plaintiff, v. Bowie K. Kuhn, etc., et al., Defendants. No. 76 C 2358.

This case comes before the Court on the motion of defendant Bowie K. Kuhn, the Commissioner of Baseball, for summary judgment. Plaintiff Charles O. Finley & Co., Inc. is the owner and operator of the Oakland A's Major League Baseball Club. The controversy arises out of the following alleged factual situation.

The Oakland A's, prior to June 25, 1976, maintained twenty-five players on its active playing roster, including the players in dispute—Vida Blue, Joe Rudi and Rollie Fingers. Vida Blue had signed a contract with the Oakland A's, and Joe Rudi and Rollie Fingers were "playing out their option year," not having signed a contract for the 1976 championship season. On June 15, 1976, plaintiff entered into a contract for the sale and assignment of the services of Vida Blue to the New York Yankees for \$1,500,000, and for the sale and assignment of the services of Rollie Fingers and Joe Rudi to the Boston Red Sox for \$2,000,000.

On June 16, 1976, defendant Kuhn notified all baseball clubs that the assignments of Blue, Fingers and Rudi raised questions which he felt merited a hearing, and set that hearing for the following day. On June 18, 1976, defendant Kuhn notified the interested parties that the assignments in question were disapproved as inconsistent with the best interests of baseball, and the players were ordered to remain on the active playing

roster of the Oakland A's. Plaintiff subsequently filed the instant lawsuit.

Defendant Kuhn's motion for summary judgment asserts the following grounds. First, it is urged that plaintiff, as a signatory of the Major League Agreement, has agreed to be bound by all decisions of the Commissioner of Baseball and to waive all right of recourse to the courts,<sup>1</sup> thereby depriving this court of subject matter jurisdiction over any part of this complaint. This question is intricately related to the second and third grounds urged in support of summary judgment: that the defendant was contractually empowered to disapprove player contracts and that he reasonably exercised that power.<sup>2</sup>

At the outset, this court rejects defendant's assertion that the court lacks jurisdiction over this cause. Simply stated, defendant's legal theory, if accepted, would entitle him to render a decision on any question dealing with baseball no matter how unauthorized or arbitrary that decision might be. This is an untenable position. The extent of defendant Kuhn's contractual power is a question for the court. Indeed, whether the Commissioner's decision in issue here is the type of decision to which the parties agreed they would be bound is itself at issue. Accordingly, jurisdiction is not lacking.

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<sup>1</sup>Article VII, §2 of the Major League Agreement reads: The Major Leagues and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed in their favor.

<sup>2</sup>The motion also seeks dismissal of plaintiff's antitrust, due process and equal protection claims for failure to state a claim upon which relief can be granted. These grounds are discussed later herein.

Defendant Kuhn suggests that the contract between the parties, consisting of the Major League Agreement (hereinafter the "Agreement") and the Major League Rules promulgated thereunder, clearly delegates the power of approval and disapproval of player transfers to the Commissioner of Baseball. In support of that position, the following provisions thereof are relevant. Article I of the Agreement, which sets forth the functions of the Commissioner, reads, in pertinent part:

(a) To Investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball. . . .

(b) To Determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action, either against Major Leagues, Major League Clubs or individuals, as the case may be.

Rule 12(a) of the Major League Rules reads:

Requirements. The Professional Baseball Executive Council shall prescribe the form of Assignments and of the Optional Agreement between Major League Clubs and National Association Clubs and no such transaction shall be recognized as valid unless within fifteen (15) days after execution a counterpart original of the document shall be filed with the Secretary-Treasurer of the Executive Council and approved by the Commissioner.

The question is, simply, whether the Commissioner's powers set forth in Article I can be used in conjunction with the approval power of Rule 12(a) to disapprove the instant transfers.

The resolution of this question is not as clear as defendant Kuhn suggests. Indeed, provisions in a contract granting apparently unfettered and final power to one individual, accompanied only by the vague standard of action "in the best interests of baseball," invite speculation as to the true intent of the parties to the contract. Rule 12 of the Major League Rules, regarded in its totality, lends some support to plaintiff's assertion that the power of approval extends only to the formalities of the transfer agreement and whether the various regulations have been complied with, and not to the actual transaction itself. Further, it is indeed arguable that Article I, Section 2, referred to above, is limited by the provision directly following, which sets forth action that may be taken by the Commissioner of Baseball after he finds conduct has occurred or may occur which is not in the best interests of baseball.<sup>3</sup> Finally, as is suggested by the plaintiff, Major League Rule 9, which provides the effective date of transfer shall be the date upon which the player affected receives notice, not the date of approval, and which sets forth the obligations of the transferee club as of the date of transfer, not the date of approval, does not appear to contemplate total invalidation of the transfer by the Commissioner of Baseball.

<sup>3</sup>Article I, §3 reads as follows:

In the case of conduct by Major Leagues, Major League Clubs, officers, employees or players which is deemed by the Commissioner not to be in the best interests of Baseball, action by the Commissioner for each offense may include any one or more of the following: (a) a reprimand; (b) deprivation of a Major League Club of representation in joint meetings; (c) suspension or removal of any officer or employee of a Major League or a Major League Club; (d) temporary or permanent ineligibility of a player; and (e) a fine, not to exceed Five Thousand Dollars (\$5,-

(This footnote is continued on next page)

Rule 56(c), Fed.R.Civ.P. provides that summary judgment shall be granted only when the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. We find there exists a threshold question of fact as to meaning of the Major League Agreement and the intent of its signatories which renders summary judgment inappropriate.

Further, assuming *arguendo*, without making a decision thereon, that the Commissioner of Baseball has been contractually authorized to invalidate player transfers, the question still remains as to whether the decision rendered was an arbitrary one. See, *Milwaukee American Association v. Landis*, 49 F.2d 298, 303 (N.D. Ill. 1931). The court has been provided with no evidentiary matter on which it could base a decision one way or the other on this question.

In accordance with the above, defendant Kuhn's motion for summary judgment, insofar as it relates to judgment on the complaint as a whole, is hereby denied.

Defendant Kuhn also moves to dismiss Count II of the complaint herein for failure to state a claim upon which relief can be granted. Count II of the complaint seeks to establish a violation of the Sherman Anti-trust Act. Baseball, the anomaly of antitrust law, is not subject to the provisions of that Act. *Federal*

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000.00) in the case of a Major League or a Major League Club and not to exceed Five Hundred Dollars (\$500.00) in the case of any officer, employee or player.

*Baseball Club of Baltimore v. National League*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972). The above cases apparently do not, as plaintiff urges, restrict the exemption of baseball only to the extent of the reserve clause system. See, *Portland Baseball Club, Inc. v. Kuhn*, 368 F.Supp. 1004, 1007 (D. Ore. 1971), *aff'd.*, *per curiam*, 491 F.2d 1101 (9th Cir. 1974); *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970). Accordingly, Count II of the complaint must be and is hereby dismissed.

Finally, defendant Kuhn moves to dismiss Counts III and IV of the complaint which allege a deprivation of due process under the First and Fourteenth Amendments and a denial of equal protection. The allegations of "state action" necessary for such claims consist of the use by some of the major league baseball clubs of state-owned stadia and judicially and legislatively created exemptions from the antitrust laws.

For an otherwise private party to be engaged in state action, there must exist a nexus between the state and the particular activity being challenged. *E.g.*, *Jackson v. Metropolitan Edison Comm.*, 419 U.S. 345 (1974). For state action to exist, the state must affirmatively support and be directly involved in the specific conduct which is being challenged. *Cannon v. The University of Chicago, et al.*, No. 76-1238, and *Cannon v. Northwestern University, et al.*, No. 76-1239 (7th Cir. 8/27/76).

Plaintiff does not allege that there is any nexus between the state and the activity of which plaintiff complains. Accordingly, Counts III and IV must be and are hereby dismissed.

In accordance with the foregoing opinion, defendant Kuhn's Motion for Summary Judgment is granted to the extent that Counts II, III and IV are dismissed, and denied in all other respects.

ENTER:

/s/ Frank J. McGarr

UNITED STATES DISTRICT JUDGE

DATED: September 7, 1976

United States District Court, Northern District of Illinois, Eastern Division.

Name of Presiding Judge, Honorable Frank M. McGarr.

Cause No. 76 C 2358

Date 3/17/77

Title of Cause Charles O. Finley & Co., Inc. an Illinois corporation v. Bowie K. Kuhn, Commissioner of Baseball

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Name and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk

Enter Findings of Fact and Conclusions of Law—  
DRAFT Enter Judgment Order in favor of defendant Bowie K. Kuhn and against plaintiff Charles O. Finley Co. Inc. — DRAFT Cause set for Status Report on counterclaims on Tuesday, March 29, 1977 at 10 a.m.

### **Findings of Fact and Conclusions of Law.**

In the United States District Court for the Northern District of Illinois, Eastern Division.

Charles O. Finley & Co., Inc., an Illinois corporation, Plaintiff, v. Bowie K. Kuhn, Commissioner of Baseball, Defendant. No. 76 C 2358

#### *Findings of Fact*

1. Plaintiff Charles O. Finley & Co., Inc. (sometimes hereinafter referred to as "plaintiff corporation") is an Illinois corporation which, through its Oakland Athletics Division, is the owner and operator of the Oakland A's baseball club, a member of the American League of Professional Baseball Clubs.

2. Charles O. Finley is the principal owner of the plaintiff corporation and is the general manager of the Oakland A's baseball club.

3. Plaintiff has owned two major league baseball clubs since 1960. From the 1960 season through the 1967 season, the club was located in Kansas City. In 1968 plaintiff moved the club to Oakland, where the club has been located ever since. Plaintiff has been a signatory to the Major League Agreement, which is described more fully in Paragraphs 5 and 6 below, continuously since 1960.

4. Defendant Kuhn is the Commissioner of Baseball. He was elected Commissioner of Baseball in 1969 and has served continuously in that position since 1969. Prior to 1969, defendant Kuhn was a practicing attorney in New York City where for several years he had represented the National League of Professional Baseball Clubs. At all times relevant herein, defendant Kuhn has been the duly elected and acting Commissioner of Baseball.

5. Defendant Kuhn was elected Commissioner of Baseball pursuant to the terms of the Major League Agreement, a contract between the 24 constituent clubs of the National and American Leagues of Professional Baseball Clubs. The Major League Agreement is the basic charter under which major league baseball operates.

6. The Major League Agreement reads, in pertinent part, as follows:

Article I, Section 2. The functions of the Commissioner shall be as follows:

a) To investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball, with authority to summon persons and to order the production of documents, and, in the case of refusal to appear or produce, to impose such penalties as are hereinafter provided.

b) To determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League Clubs or individuals, as the case may be.

#### **Section 3.**

In the case of conduct by Major Leagues, Major League Clubs, officers, employees or players which is deemed by the Commissioner not to be in the best interests of Baseball, action by the Commissioner for each offense may include any one or more of the following: 1) a reprimand; b) deprivation of a Major League Club of representation in joint meetings; c) suspension or removal

of any officer or employee of a Major League or a Major League Club; d) temporary or permanent ineligibility of a player; and 3) a fine, not to exceed Five Thousand Dollars (\$5,000.00) in the case of a Major League or a Major League Club and not to exceed Five Hundred Dollars (\$500.00) in the case of any officer, employee or player.

Article VII, Section 2.

The Major Leagues and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed in their favor.

7. The Major League Rules, which govern many aspects of the game of baseball, are promulgated by vote of the major league club owners. Rule 12(a) of the Major League Rules provides as follows:

Requirements. The Professional Baseball Executive Council shall prescribe the form of Assignments and of the Optional Agreements between Major League Clubs and National Association Clubs and no such transaction shall be recognized as valid unless within fifteen (15) days after execution a counterpart original of the document shall be filed with the Secretary-Treasurer of the Executive Council and approved by the Commissioner.

8. Prior to June 15, 1976, players Joe Rudi, Rollie Fingers and Vida Blue (sometimes hereinafter referred to as "Rudi, Fingers and Blue") were members of the active playing roster of the Oakland A's baseball

club, and were contractually bound to play for the Oakland A's through the end of the 1976 baseball season. During the 1976 season, only Oakland could attempt to negotiate contracts with these players for future years.

9. As of June 15, 1976, players Rudi and Fingers had not signed contracts to play for the A's in seasons subsequent to 1976. If Rudi and Fingers had not signed contracts with the A's by the conclusion of the 1976 season, they would have become free agents eligible thereafter to negotiate with any major league club, subject to certain limitations on their right to do so that were then being negotiated by the major league clubs with the Major League Players Association. On or about June 15, 1976, the Oakland A's negotiated a contract with player Blue pursuant to which Blue agreed to play for the A's through the 1977, 1978 and 1979 seasons.

10. On June 14 and 15, 1976, the Oakland A's negotiated tentative agreements to sell the club's contract rights to the services of Rudi and Fingers to the Boston Red Sox for \$2 million, and its contract rights to the services of Blue to the New York Yankees for \$1.5 million. These agreements were negotiated shortly before expiration of Baseball's trading deadline at midnight on June 15, after which time plaintiff could not have sold the contracts of these players to other American League clubs without first obtaining "waivers", i.e., without first offering the players to all other American League teams, in inverse order of their standing, at the stipulated waiver price of \$20,000.

11. On June 18, 1976, defendant Kuhn, acting in his capacity as Commissioner of Baseball and invok-

ing Article I, Section 2, of the Major League Agreement and Rule 12(a) of the Major League Rules, disapproved the assignments of the contracts of Rudi, Fingers and Blue to the Red Sox and Yankees on the ground that the transactions were "not in the best interests of baseball." Defendant Kuhn's reasons for concluding that the transactions were not in the best interests of baseball were set forth in a written decision dated June 18, 1976, which was circulated to plaintiff and to the Red Sox and Yankees and which is described more fully hereafter.

12. Thereafter, on June 25, 1976, plaintiff instituted this suit challenging, as beyond the scope of the Commissioner's authority and, in any event, as arbitrary and capricious, defendant Kuhn's disapproval of the Rudi, Fingers and Blue transactions.

13. Prior to 1921, baseball was governed by a three-man National Commission formed in 1903 which consisted of the presidents of the National and American Leagues and a third member, usually one of the club owners, selected by the presidents of the two leagues. Between 1915 and 1921, a series of events and controversies contributed to a growing dissatisfaction with the National Commission on the part of players, owners and the public, and a demand developed for the establishment of a single, independent Commissioner of Baseball.

14. On September 28, 1920, the public first learned of the "Black Sox" scandal. On that date, an indictment issued charging that there has been an effort to "fix" the 1919 World Series by several Chicago White Sox players. This scandal rocked the game of baseball in the fall of 1920 and proved the catalyst that finally

brought about the establishment of a single, neutral Commissioner of Baseball in November of 1920.

15. In November, 1920, the major league club owners unanimously elected federal judge Kenesaw Mountain Landis as the sole Commissioner of Baseball and appointed a committee of owners to draft a charter setting forth the Commissioner's authority.

16. The language selected by the drafting committee to effectuate the club owners' grant of authority to the Commissioner was as follows:

Article I. The Commissioner.

Section 2. The functions of the Commissioner shall be as follows:

a) To investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of baseball.

b) To determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League Clubs or individuals, as the case may be.

\* \* \*

Article VII. Submission to Jurisdiction of Commissioner.

Section 1. The Major Leagues, and their constituent Clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this agreement, and severally waive such right of recourse to the Courts as would otherwise have existed in their favor.

17. An attempt was made in one of the drafting sessions to place limitations on the Commissioner's authority. In the original draft, the Commissioner had been given the authority to order the "suspension or removal" of any official or employee of a major league or a major league club found to have engaged in conduct detrimental to baseball. The drafting committee at a meeting not attended by Judge Landis amended the original draft to limit the Commissioner's power to "recommend" suspension or removal.

18. With this proposed limitation on his powers, Judge Landis, at a meeting of all of the club owners, refused to accept the Office of Commissioner. At a meeting on January 12, 1921, immediately prior to the adoption of the Major League Rules and the signing of Judge Landis' contract, Landis stated that when he had been approached to take the job of Commissioner, it was on the clear understanding that the clubs sought "an authority . . . outside of your own business, and that a part of that authority would be a control over whatever and whoever had to do with Baseball." Judge Landis continued:

Another impression, following out what I have indicated was in my mind, as your program, was that there had grown up in baseball certain evils which were not limited to bad baseball players; that men who never handled the ball but men who controlled ball clubs in the past have been guilty of various offenses, and that you gentlemen recognized that fact and you had made up your minds the time had come for a situation to be created where somebody would be given authority, if I may [p]ut it brutally, to save you from yourselves . . . Accordingly, we met at New York

. . . and we drew up a tentative agreement for the Major Leagues, and it provided for authority to be exercised by the Commissioner . . .

At the drafting committee meeting at New York certain words were put down on paper, the reasonable impression of which upon the mind of a person of ordinary intelligence and a person of highly technical knowledge was that you gentlemen had finally concluded that there should be devolved by the spoken word, the written word, a commission[er] having power to deal with whatever evil came up in your game.

19. After Judge Landis stated his position the owners voted unanimously to reject the proposed limiting amendment and to reinstate the original draft of the Major League Agreement.

20. Immediately after the signing of the Major League Agreement, as it had been originally drafted, the following resolution was unanimously adopted and signed by all of the club owners:

Pledge of Loyalty

Chicago, January 12, 1921

We, the undersigned, earnestly desirous of insuring to the public wholesome and highclass baseball, and believing that we ourselves should set for the players an example of the sportsmanship which accepts the umpire's decision without complaint, hereby pledge ourselves loyally to support the Commissioner in his important and difficult task; and we assure him that each of us will acquiesce in his decisions even when we believe them mistaken, and that we will not discredit the sport by public criticisms of him or of one another.

21. Pursuant to Article I, Section 2 of the Major League Agreement—the so-called “best interests” clause—Judge Landis, in fact, exercised broad authority over the game of baseball. During his 25 years as Commissioner, Judge Landis found many acts, transactions and practices to be detrimental to the best interests of baseball in situations where neither moral turpitude nor a Major League Rule violation was involved, and he disapproved several player assignments.

22. After the death of Judge Landis in 1944, the Major League club owners narrowed the power of the Commissioner of Baseball by amending the Major League Agreement in two respects. First, the owners deleted from the Major League Agreement the provision by which the clubs in 1921 had agreed to waive their right of recourse to the courts to challenge actions of the Commissioner. Second, the owners inserted in Article I, Section 3 of the Major League Agreement the following provision:

No Major League Rule or other joint action of the two Major Leagues, and no action or procedure taken in compliance with any such Major League Rule or joint action of the two Major Leagues should be considered or construed to be detrimental to Baseball.

The latter amendment had the effect of precluding the Commissioner of Baseball from finding an act that complied with the Major League Rules to be detrimental to the best interests of baseball.

23. The foregoing 1944 amendments to the Major League Agreement remained effective during the terms of the next two Commissioners, A.B. “Happy” Chandler and Ford Frick.

24. Upon Commissioner Frick’s retirement in 1964, Frick urged that the powers enjoyed by Judge Landis as Commissioner be restored. Frick stated that the 1944 amendments to the Major League Agreement had limited the authority of the Commissioner to

. . . act positively in such present problems as expansion and club movement; transfer of franchises; handling of television and radio problems, etc., and denied his authority to penalize or estop, as detrimental to Baseball, an action taken by any club or individual in compliance with joint action rules.

25. In accordance with Commissioner Frick’s recommendations, the Major League clubs, at a joint meeting in 1964, adopted three amendments to the Major League Agreement.

26. The first of the 1964 amendments deleted the language from Article I, Section 3, which had been added in 1944, preventing the Commissioner from finding any act or practice “taken in compliance” with a Major League Rule to be “detrimental to baseball.”

27. The second of the 1964 amendments was the restoration to Article VII, Section 2 of the provision, which had been deleted in 1944, waiving any rights of recourse to the courts to challenge a Commissioner’s decision. Mr. Finley voted against this amendment; he was the only owner to do so.

28. A third change was made in 1964 affecting the power of the Commissioner. Whereas previously the Commissioner had to find conduct “detrimental” to the best interests of baseball in order to take remedial or preventive action under Article I, Section 2, the clubs in 1964 amended that provision to read, “not in the best interests of baseball.”

29. Mr. Finley, on behalf of the Kansas City Athletics (now the Oakland A's), executed and is bound by the Major League Agreement, as amended in 1964.

30. On numerous occasions since he became Commissioner of Baseball in February, 1969, Commissioner Kuhn has exercised broad authority under the best interests clause of the Major League Agreement. Many of the actions taken by Commissioner Kuhn have been in response to acts, transactions or practices that involved neither the violation of a Major League Rule nor any gambling, game-throwing or other conduct associated with moral turpitude. Moreover, on several occasions Commissioner Kuhn has taken broad preventive or remedial action with respect to assignments of player contracts.

31. For example, in 1969, shortly after becoming Commissioner, defendant Kuhn overruled a Major League Rule and ordered the consummation of an assignment of player contracts between the Houston and Montreal clubs invalid under Major League Rule 12(f), because in his judgment this was "in the best interests of baseball." Houston had agreed to assign the contract of player Rusty Staub to Montreal in exchange for the contracts of Donn Clendenon and Jesus Alou. Upon learning of the assignment, Clendenon announced his retirement from baseball. Rule 12(f) provided, at that time, that if one player involved in an assignment refused to report to the assignee club, the entire assignment was void. Commissioner Kuhn conducted an investigation of the transaction and concluded that the Montreal fans, who had expressed great interest in and enthusiasm over the acquisition of Staub, would be greatly disappointed if Staub were not permitted to remain with Montreal. On this basis the Commis-

sioner, acting in what he described as "the best interests of baseball" ordered that the assignments of Staub to Montreal and Alou to Houston be consummated, and that Montreal assign suitable players to Houston to replace Clendenon. The Commissioner's order further specified that, failing the ability of the two clubs to agree on the players to replace Clendenon, the Commissioner himself would determine which players Montreal would assign to Houston.

32. In the same year, Commissioner Kuhn intervened in an assignment between the Boston and Cleveland clubs under his best interests of baseball powers. Boston had assigned the contracts of three players to Cleveland in exchange for the contracts of three Cleveland players. Ken Harrelson, one of the Boston players, announced that he would not report to Cleveland. Commissioner Kuhn immediately ordered the assignment suspended and directed the Boston and Cleveland clubs not to play any of the six players involved. They complied. Ultimately, after a hearing in the Commissioner's office, Harrelson agreed to report to Cleveland, and only then did the Commissioner permit the assignment to be consummated and the Boston and Cleveland clubs to play the players involved.

33. Also in 1969, Commissioner Kuhn overruled the Major League Rule relating to assignments of the contracts of players entitled to "progress bonus payments." The rule specified that when the contract of a player entitled to a progress bonus payment (a bonus to a player for earning promotion to a league of higher classification) was assigned, the obligation to make the payment to the player passed from the assignor club to the assignee. Commissioner Kuhn determined that the application of this rule would create a hardship

for the four newly-created and financially hard-pressed expansion clubs in the major leagues, and decided that, despite the rule, the best interests of baseball required that all progress bonus payments due to players assigned to an expansion club would be payable by the assignor clubs and not the assignee.

34. In 1974, Commissioner Kuhn again overruled a Major League Rule because he determined that it was contrary to the best interests of baseball. The clubs had voted to amend the Major League Rule relating to the draft of college players in such fashion to make it easier for them to draft players participating in college baseball programs. Representatives of college baseball expressed their displeasure to the Commissioner. Commissioner Kuhn decided that the new rule was not in the best interests of baseball and, accordingly, suspended the rule and ordered that a committee be formed, composed of representatives of the clubs and colleges, for the purpose of drafting a different rule that would satisfy the college representatives. The committee was formed, a different rule was drafted and, ultimately, this rule was adopted by the Major League clubs.

35. In March 1974, Commissioner Kuhn ordered the Atlanta Braves to include player Henry Aaron in the starting lineup in at least two of the Braves' first three games of the season in Cincinnati. At the time, Aaron had hit 713 home runs in his career, one shy of the all-time home run record set by Babe Ruth. The Atlanta club had announced its intention to withhold Aaron from its games in Cincinnati, and to reinsert him in the lineup when the club returned home to Atlanta, so that Aaron hopefully would tie and surpass the record in that city and attract great

numbers of fans to the ball park in the process. The intentions of the Atlanta club violated no Major League Rule and involved no moral turpitude. Commissioner Kuhn ruled that it would not be "in the best interests of baseball" for the Atlanta club to withhold Aaron from use in the games in Cincinnati.

36. In the spring of 1976, the Major League clubs were engaged in difficult collective bargaining negotiations with the Major League Baseball Players Association and announced that they would not open their spring training camps until a collective bargaining agreement was reached. Upon determining that "the consideration of our fans and the overall best interests of the game require it," Commissioner Kuhn issued a written directive to the 24 Major League clubs ordering them to open their spring training camps forthwith. Many of the clubs strenuously disagreed with the Commissioner, but none challenged his authority under the best interests clause to issue this order and they all opened their spring training camps immediately.

37. Twenty-one of the 25 parties to the current Major League Agreement who appeared in this case testified that they intended and they presently understand that the Commissioner of Baseball can review and disapprove an assignment of a player contract which he finds to be not in the best interests of baseball, even if the assignment does not violate the Major League Rules and does not involve moral turpitude. (MacPhail Tr. 395; Feeney Tr. 1811; O'Malley Tr. 1627; Fitzgerald Tr. 1590; Fetzer Tr. 1482, 1483; McHale Tr. 1535; O'Connell Tr. 896, 912, 1762; E.J. Bavasi Tr. 1292-93; Kauffman Tr. 1438; Smith Dep., Ex. K-95, p. 6; Grant Dep., Ex. K-92, pp. 5, 6; Dalton Dep., Ex. K-89, p. 9; Corbett Dep.,

Ex. K-88, pp. 6-7; Carpenter Dep., Ex. K-86; Bonda Dep., Ex. K-85, p. 6; P. Bavasi Dep., Ex. K-84, pp. 8-9; Bartholomay Tr. 1794-95; Wrigley Tr. 1111; Lurie Dep., Ex. K-94, p. 4.)

38. In addition, the evidence shows that the only available former Commissioner and both living former Major League Presidents believed and operated on the assumption through all of their years in baseball that the Commissioner has had, and continues to have, such authority. (Chandler Tr. 639, 646-47, 655; E. J. Bavasi Tr. 1290; O'Malley Tr. 1623-26; Ex. K-108; Cronin Tr. 1133; Giles Tr. 1363-64.)

39. Major League Rule 12(a) provides that player assignments be on a prescribed form, no such assignment to be valid unless within fifteen days after execution, a counterpart original of the assignment shall be filed with the Executive Committee and approved by the Commissioner.

40. The Commissioner's office learns about an assignment of player contracts immediately; by means of teletype notice sent by the clubs involved as soon as the assignment is made. After review by the Commissioner's office, if the assignment is approved it is listed in the Commissioner's Bulletin which is circulated to all Major League clubs. Listing in the Commissioner's Bulletin constitutes formal approval of the assignment by the Commissioner. The assignment forms that are filled out by the clubs have a space designated on the back for the Commissioner to sign if he approves the transaction.

41. Most assignments of player contracts are routine, involving nothing unusual or out of the ordinary; such assignments are processed by members of the

Commissioner's staff and are seldom brought directly to the Commissioner's attention. However, all assignments involving anything odd or unusual, or involving star players, multiple players or large amounts of cash are brought to Commissioner Kuhn's attention and are personally reviewed by him.

42. There are several reasons for this procedure, one of the most obvious being to allow the Commissioner to maintain an accurate player roster for each team. Among the reasons for this procedure is the clear intention to allow the Commissioner to review and exercise his broad authority over player assignments before they become final. Though the approval of most assignments is perfunctory, it is not a mere ministerial function.

43. On several occasions, Mr. Finley himself has espoused the same position as the other parties to the Major League Agreement, namely, that the Commissioner has the authority to exercise broad powers pursuant to the best interests clause, even where there is no violation of the Major League Rules and no moral turpitude is involved.

44. In 1975, Mr. Finley asked the Commissioner to disapprove the assignment of player Dave Johnson from the Atlanta Braves to a Japanese club. Mr. Finley was informed by John Johnson of the Commissioner's office that the assignment of Dave Johnson to a Japanese club complied in all respects with the Major League Rules. Nevertheless, Mr. Finley requested that the Commissioner block the deal because, according to Mr. Finley, a player of Dave Johnson's caliber should not have been allowed by the Commissioner to be assigned to play for a club in Japan.

45. In 1973, Mr. Finley asked Commissioner Kuhn to overrule a Major League Rule which permitted the New York Mets to refuse to allow the Oakland A's to add a player to their roster for the 1973 World Series. Under a rule in effect at that time, the Oakland club could only add a player to its World Series roster if it obtained the permission of the opposing club, in this case the Mets. When the Mets refused permission, Mr. Finley asked the Commissioner to override the rule and permit Oakland to add the player despite the Mets' refusal.

46. In 1967, Mr. Finley gave player Ken Harrelson unconditional release in the middle of the season, thereby making Harrelson a free agent eligible to negotiate with any other club. Shortly thereafter, Mr. Finley asked the Commissioner to negate Harrelson's unconditional release and restore the player to Mr. Finley's roster, even though the release of Harrelson did not violate any Major League Rule.

47. The history of the adoption of the Major League Agreement in 1921 and the operation of baseball for more than 50 years under it, including: the circumstances preceding and precipitating the adoption of the Agreement; the numerous exercises of broad authority under the best interests clause by Judge Landis and each of his successors, including Commissioner Kuhn; the amendments to the Agreement in 1964 restoring and broadening the authority of the Commissioner; the testimony of the current parties to the Agreement as to their intent when they signed the Agreement] and most important the express language of the Agreement itself—are all to the effect that the Commissioner has the authority to determine whether any act, transaction or practice is "not in the best

interests of baseball," and upon such determination, to take whatever preventive or remedial action he deems appropriate, whether or not the act, transaction or practice complies with the Major League Rules or involves moral turpitude.

48. At the beginning of the scheduled hearing on this matter in the Commissioner's office on June 17, Commissioner Kuhn expressly noted that one of the options available to him was to set aside the assignments. All of the parties took advantage of the opportunity to present what they deemed to be the relevant facts and considerations, including Mr. Finley.

49. No one in attendance at the hearing, including Mr. Finley, claimed at the hearing that the Commissioner lacked the authority to disapprove the assignments. Moreover no one objected to the holding of the hearing, or to any of the procedures followed at the hearing.

50. On the day following the hearing, June 18, 1976, defendant Kuhn reached the conclusion that the attempted assignments of Rudi, Fingers and Blue should be disapproved as not in the best interests of baseball. He then drafted a written decision in which he stated this conclusion and set forth each of the reasons why, in his judgment, the attempted assignments should be disapproved. He sent the decision via teletype to all interested parties.

51. In his written decision, Commissioner Kuhn recognized "that there have been cash sales of player contracts in the past." However, the Commissioner concluded that "these transactions were unparalleled in the history of the game" because there was "never anything on this scale or falling at this time of the

year, or which threatened so seriously to unbalance the competitive balance of baseball.”

52. The evidence supports Commissioner Kuhn’s conclusion that the attempted assignments of Rudi, Fingers and Blue were at a time and under circumstances making them unique in the history of baseball.

53. It is beyond the province of this court to consider the wisdom of the Commissioner’s reasons for disapproving the assignments of Rudi, Blue and Fingers. There is insufficient evidence, however, to support plaintiff’s allegation that the Commissioner’s action was arbitrary or capricious, or motivated by malice, ill will or anything other than the Commissioner’s good faith judgment that these attempted assignments were not in the best interests of baseball. The great majority of persons involved in baseball who testified on this point shared Commissioner Kuhn’s view.

54. On August 12, 1976, at a joint meeting of the Major League clubs in Phoenix, Arizona, the clubs voted 21 to 3 to indemnify Commissioner Kuhn for legal expenses and potential damages sustained in this litigation. The indemnification vote implemented a standing resolution of the Major League clubs, originally adopted December 5, 1969, which specifies that the Commissioner may be indemnified only if the clubs determine that he “acted in good faith in any manner he reasonably believed to be in and not opposed to the best interests of the Major Leagues.” Plaintiff has argued that this financial commitment tainted the credibility of certain of the witnesses. It is more persuasive, however, in support of the contention that the Commissioner’s action was not capricious and arbitrary.

55. The court finds that Commissioner Kuhn acted in good faith, after investigation, consultation and deliberation, in a manner which he determined to be in the best interests of baseball. Whether he was right or wrong is beyond the competence and the jurisdiction of this court to decide.

#### *Conclusions of Law*

I. In Article VII, Section 2 of the Major League Agreement, the Major League clubs, including plaintiff, pledged “to be bound by the decisions of the Commissioner” and to “waive such right of recourse to the courts as would otherwise have existed in their favor.” This judicial waiver provision was adopted in 1921.

This provision, after having been deleted from the Major League Agreement between 1944 and 1964, was reinstated in 1964.

This court has earlier denied a motion for summary judgment based upon this clause. In view of the doubts raised at the time by the pleadings as to the scope and impact of the Major League Agreement, and the related contract issues raised by the presence in the case of the Boston Red Sox and the New York Yankees, the summary judgment issue was not deemed ripe for disposition at that time. The court doubted also whether it might not be contrary to public policy to contract away resort to the courts, in the absence of some alternative means for the resolution of disputes as to the meaning and applicability of a contract. This latter issue has not been developed or explored during the case, and is now moot. In view of the disposition of the case reflected in this opinion, the impact of Article VII, Section 2 of the Major League Agreement is not decided by this court in this case.

II. Pursuant to Article I, Section 2 of the Major League Agreement, the Commissioner of Baseball has the authority to prevent a Major League club from engaging in any transaction he finds to be not in the best interests of baseball.

Pursuant to Article I, Section 2 of the Major League Agreement and under the procedures established by Rule 12(a) of the Major League Rules, defendant Kuhn had the authority to disapprove the attempted assignments by plaintiff of the contracts of players Rudi, Fingers and Blue to the Boston Red Sox and New York Yankees, if he found those transactions to be "not in the best interests of baseball."

Defendant Kuhn duly found the Rudi, Fingers and Blue transactions to be not in the best interests of baseball.

Defendant Kuhn's action in disapproving the assignment of the contracts of players Rudi, Fingers and Blue was neither arbitrary nor capricious.

In disapproving the assignments of the contracts of players Rudi, Fingers and Blue, defendant Kuhn did not act out of malice or ill will toward Charles O. Finley personally or toward the plaintiff corporation.

The contracts between plaintiff and the Boston Red Sox and New York Yankees were tentative and required the approval of defendant Kuhn. Inasmuch as defendant Kuhn disapproved these contracts and in doing so acted reasonably within the scope of his authority, the contracts were never consummated. Accordingly,

defendant Kuhn did not induce a breach of contract by the Boston Red Sox and New York Yankees.

ENTER:

/s/ Frank J. McGarr

UNITED STATES DISTRICT JUDGE

DATED: March 17, 1977

### Judgment Order.

In the United States District Court, for the Northern District of Illinois, Eastern Division.

Charles O. Finley & Co., Inc., an Illinois corporation, Plaintiff, v. Bowie K. Kuhn, Commissioner of Baseball, Defendant. No. 76 C 2358.

The fact that this case has commanded a great deal of attention in the vociferous world of baseball fans, and has provoked widespread and not always unemotional discussion, tends to obscure the relative simplicity of the legal issues involved. The case is not a Finley-Kuhn popularity contest—though many fans so view it. Neither is it an appellate judicial review of the wisdom of Bowie Kuhn's actions. The question before the court is not whether Bowie Kuhn was wise to do what he did, but rather whether he had the authority.

If the Commissioner had such authority, it must be because he derives it from the provisions of the Major League Agreement in effect in 1976. The considerable testimony as to the history of the Major League Agreements and the actions of the several commissioners under this and earlier similar agreements is relevant only as an aid to understanding the 1976 Agreement and the power it conferred upon defendant Kuhn.

The extensive argument as to the meaning of the applicable agreement boils down to a single issue. Commissioner Kuhn contends that under the Major League Agreement he has the absolute authority to investigate any matter and to take any action, preventative or remedial, against a league, a club or a player which he determines to be dictated by the best interests

of baseball. This view gives the Commissioner—and indeed he claims—powers with no limit but his own judgment and discretion, and subject to no review except the power of the owners to remove him from office.

Plaintiff Finley, a signer of the Agreement in question, contends that a proper understanding of the Major League Agreement in accordance with accepted legal principles of construction limits the broad power of the Commissioner to a specific area, that is to matters involving the enforcement of rules, immorality and dishonesty. It was never contemplated, plaintiff argues, that the Commissioner be empowered to become involved in the business affairs or assignment transactions of the individual clubs.

Article I, Section 2 of the Major League Agreement provides, in pertinent part:

Article I. The Commissioner.

Section 2. The functions of the Commissioner shall be as follows:

a) To investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of baseball.

b) To determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League Clubs or individuals, as the case may be.

Article VII, Section 2 provides in pertinent part:

The Major Leagues and their constituent clubs, severally agree to be bound by the decisions of

the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed in their favor.

Rule 12(a) of the Major League Rules provides in pertinent part:

Requirements. The professional Baseball Executive Council shall prescribe the form of Assignments and of the Optional Agreements between Major League Clubs and National Association Clubs and no such transaction shall be recognized as valid unless within fifteen (15) days after execution a counterpart original of the document shall be filed with the Secretary-Treasurer of the Executive Council and approved by the Commissioner.

The questionable wisdom of this broad delegation of power is not before the court. What the parties intended is. And what the parties clearly intended was that the Commissioner was to have jurisdiction to prevent any conduct destructive of the confidence of the public in the integrity of baseball. So broad and unfettered was his discretion intended to be that they provided no right of appeal, and even took the extreme step of foreclosing their own access to the courts.

Plaintiff argues that the enumeration in Article I, Section 3 of the sanctions which the Commissioner may impose place a limit on his powers to act in the best interests of baseball granted by this article. The power to disapprove and set aside assignments of players is not included. However, Section 3 does not say that the Commissioner shall have *only* the power to act in the enumerated ways, though that could have been said if it was intended. The section

says that the Commissioner *may* act in one of the enumerated ways, without expressly so limiting him.

The question arises whether this enumeration of sanctions which the Commissioner might impose invokes the established rules of construction that the specific controls the general, and that the expression of a type or types of authority operates to exclude the conclusion that other and different types of authority were intended to be conferred.

These principles of construction are not applicable here. The Major League Agreement Article I, Section 2 provides that when the Commissioner suspects that any act, transaction or practice is not in the best interests of baseball, his function is to determine what preventative, remedial or punitive action is appropriate, and to take such action.

Section 3 provides that in the case of conduct by Leagues, Clubs, officers, employees or players which the Commissioner deems not in the best interests of baseball, he may reprimand, deprive, suspend, or remove, declare ineligible or fine. All these listed sanctions are "punitive". Nowhere in the Agreement is there a comparable list of the "preventative" or "remedial" actions he is empowered to take. Obviously such a list would be impossible to draw in the face of the unpredictability of the problems which might arise.

In sum, neither the Major League Agreement itself, the principles of construction applied to it, nor the history of its formulation and the exercise of power under it, support the contention that authority so broadly granted and so conspicuously unfettered was intended to be limited to the areas of rules enforcement, dishonesty and moral turpitude.

Many years ago, in the case of *Milwaukee American Association v. Landis*, 49 F.2d 298 (N.D. Ill. 1931), the court determined this same issue in this same manner. From that date to this, if the signatories to the Major League Agreement had wished to bar the Commissioner from their property rights in players' contracts, it has always been and still remains within their power to do so. They have not.

Accordingly, it is the judgment of this court that plaintiff Charles O. Finley & Co., Inc., has failed to sustain the allegations of its complaint, and the relief sought therein is denied. Judgment is consequently entered for defendant Bowie K. Kuhn.

ENTER:

/s/ Frank J. McGarr

UNITED STATES DISTRICT JUDGE

DATED: March 17, 1977

United States District Court, Northern District of Illinois, Eastern Division.

Name of Presiding Judge, Honorable FRANK J. McGARR.

Cause No. 76 C 2358.

Date April 7, 1977.

Title of Cause Charles O. Finley & Co., Inc. vs. Bowie K. Kuhn, etc. et al.

Brief Statement of Motion.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel.

Representing.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk.

Plaintiffs motion for new trial and motion to amend and supplement findings of fact and conclusions of law are denied.

/s/ McGarr, J.

United States District Court, Northern District of Illinois, Eastern Division.

Name of Presiding Judge, Honorable FRANK J. McGARR.

Cause No. 76 C 2358.

Date Aug. 29, 1977.

Title of Cause CHARLES O. FINLEY & CO. INC. vs. BOWIE K. KUHN, etc., et al.

Brief Statement of Motion.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel.

Representing.

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk.

Pursuant to memorandum opinion and order, the application of defendants-counterplaintiffs Kuhn and Boston for a declaratory judgment that the covenant not to sue contained in Article VII, Section 2 of the Major League Agreement is valid and enforceable, is granted. Defendants-counterplaintiffs Kuhn and Boston's prayer for damages measured by court costs and attorney fees and other costs of defense is denied. (draft)

**Memorandum Opinion and Order.**

In the United States District Court, for the Northern District of Illinois, Eastern Division.

Charles O. Finley & Co., Inc., an Illinois corporation, Plaintiff, v. Bowie K. Kuhn, etc., et al., Defendants. No. 76 C 2358.

The instant controversy originated with a challenge by owner Finley to the power claimed and asserted by Commissioner Kuhn to disapprove and set aside certain player assignments. The court earlier held that the Major League Agreement, signed by all parties involved, did confer on Kuhn the power he claimed.

Defendant Kuhn has counterclaimed against Finley, seeking all of his costs of defense by virtue of Finley's violation of a covenant not to sue, and his alleged bad faith in instituting the litigation. Defendant Boston Red Sox has similarly counter claimed.

Now before the court for decision are cross motions for summary judgment on the counterclaims.

An earlier defense motion for summary judgment, at the outset of the litigation, was denied in a memorandum opinion dated September 7, 1976. In that opinion, total reliance on the covenant not to sue contained in the Major League Agreement was not deemed appropriate without an evidentiary elucidation of the history of the agreement and its past application, as an aid to its present construction and interpretation.

Now, after the trial and decision adverse to Finley, the issue rises again as the gist of defendants' claim for damages measured by the total cost of their defense. The defendants seek also a declaratory judgment as to the validity of the Major League Agreement covenant not to sue.

At first blush, an agreement to forego access to the courts seems to raise public policy considerations. A study of the cases, however, dispels this initial impression. It is the law that informed parties, freely contracting, may waive their recourse to the courts. *D. H. Overmyer Co., Inc. v. Frick*, 405 U.S. 174 (1972). *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). While it is true, as Finley argues, that the defendants' cases are not factually analogous to the case here, the Supreme Court decisions cited by Kuhn clearly signal the total repudiation of the argument that covenants not to sue are contrary to public policy.

There is no dispute that plaintiff Finley, after arguing against the covenant not to sue, knowingly accepted and signed the agreement containing it. Plaintiff argues that the consequent totally unlimited and breathtakingly broad powers thus granted the Commission constitute a reduction *ad absurdum* refutation of this interpretation of the agreement. Were the agreement ambiguous, this might be so. But the agreement is clear and the results clearly intended. The court has several times questioned the wisdom of this no-appeal-no-litigation agreement, but its wisdom is not an issue before the court.

The application of defendants-counterplaintiffs Kuhn and Boston for a declaratory judgment that the covenant not to sue contained in Article VII, Section 2 of the 1976 Major League Agreement is valid and enforceable, is granted.

Thus, the court finds that in filing this suit, Charles O. Finley acted in violation of a valid contractual commitment not to do so. What liability for damages

to counterplaintiffs Kuhn and Boston this may create thus becomes the next and last issue to be resolved in this case.

At the outset, it should be noted that a knowing agreement to a covenant not to sue may be accompanied by a mental reservation as to its legal validity and enforceability. At the time of the original adoption of the clause, and even at the time of its re-adoption in 1964, its legal validity was open to some question. The evidence has revealed reservations in this regard by some persons closely involved with the agreement and Charles Finley could have and probably did share their views.

Thus, there is no clear showing that plaintiff Finley acted with malicious or bad faith disregard of his contract obligations. Competent counsel have advanced reasoned arguments on both sides of the validity issue. That the court has decided against the plaintiff does not deny him his right to have raised and litigated this issue. To penalize him *ex post facto* for so doing would be unjust.

For the foregoing reasons, defendants-counterplaintiffs Kuhn and Boston's prayer for damages measured by court costs and attorney fees and other costs of defense is denied.

/s/ Frank J. McGarr

UNITED STATES DISTRICT JUDGE

DATED: August 29, 1977.

Service of the within and receipt of a copy  
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Supreme Court, U. S.  
**FILED**

**AUG 30 1978**

MICHAEL RODAK, JR., CLERK

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**IN THE**  
**Supreme Court of the United States**  
**October Term, 1978**

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**No. 78-10**

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**CHARLES O. FINLEY & CO., INC.,**  
an Illinois Corporation,  
*Petitioner,*

v.

**BOWIE K. KUHN,**  
Commissioner of Baseball, *et al.,*  
*Respondents.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Seventh Circuit

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**BRIEF OF RESPONDENT BOWIE K. KUHN  
IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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**BRIEF OF RESPONDENT BOWIE K. KUHN  
IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

QUESTIONS PRESENTED

1. Whether, at the request of a major league baseball club seeking review of a ruling by the Commissioner of Baseball, this Court should overturn its decisions in *Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); and *Flood v. Kuhn*, 407 U.S. 258 (1972), holding that the business of professional baseball is not within the scope of the federal antitrust laws unless and until Congress determines otherwise?

2. Whether the Court of Appeals was correct in holding that the district court made adequate findings as to the

fairness of the Commissioner's procedures where the district court expressly found that after providing written notice to all interested parties, the Commissioner held a full, fair and transcribed hearing and wrote a reasoned decision, which the district court held to be "duly" taken and neither arbitrary nor capricious?

3. Whether the Court of Appeals was correct in holding that the district court in this non-jury trial did not err when it limited the cross-examination of a witness by refusing to permit questions which were beyond the scope of direct and which were fully covered in the witness' deposition testimony which had been earlier admitted in evidence?

4. Whether the Court of Appeals correctly interpreted Illinois common law when it affirmed the district court's declaratory judgment that a covenant not to sue the Commissioner of Baseball — adopted voluntarily, intelligently and knowingly by the parties to the Major League Agreement — is valid and may be enforced, with certain exceptions, in the future?

### STATEMENT OF THE CASE

Petitioner seeks review of the Court of Appeals' unanimous affirmance of a judgment by the district court (McGarr, J.) holding that the Commissioner of Baseball acted reasonably and within the scope of the express contractual authority granted him by the Major League Agreement<sup>1</sup> and the Major League Rules<sup>2</sup> when he reviewed

<sup>1</sup>The Major League Agreement, a contract among the 26 Major League clubs, provides in pertinent part that the Commissioner of Baseball shall have the power:

"to investigate . . . any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of baseball . . . [and] [t]o determine . . . what preventive, remedial or punitive action is appropriate in the premises and to take such action . . . ." (Trial Exhibit K-1;

and disapproved petitioner's proposed assignments of player contracts. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978).

The facts underlying this suit are as follows: In the middle of the 1976 baseball season, petitioner, the owner of a Major League baseball club and a signatory to the Major League Agreement, proposed to assign the contracts of three players for cash to two pennant-contending clubs in petitioner's league. (Findings of Fact, App., p. 53.) Acting pursuant to the Major League Agreement and Rules, Baseball Commissioner Bowie K. Kuhn issued written notice of a hearing at which all interested parties had the opportunity, with the assistance of counsel, to present and examine witnesses, introduce evidence and make arguments in support of their respective positions as to whether these assignments were "in the best interests of baseball." (Trial Exhibits K-55, K-56; Findings of Fact, App., pp. 66-67.) Following the transcribed hearing, the Commissioner issued a written decision setting forth his reasons for disapproving the proposed assignments as "not in the best interests of baseball." (Trial Exhibit K-67; Findings of Fact, App., pp. 67-68.)

Thereafter, petitioner filed suit in the United States District Court for the Northern District of Illinois. Its principal claim was that the Major League Agreement did not authorize the Commissioner to disapprove assignments of

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Findings of Fact, Appendix to Petitioner's Petition for Writ of Certiorari, p. 51 [hereinafter cited as "App., p. —"].

<sup>2</sup>Major League Rule 12(a), promulgated by the Major League clubs pursuant to the Agreement, provides that no assignment of a player contract:

"shall be recognized as valid unless within 15 days after execution a counterpart [of the] original shall be filed . . . and approved by the Commissioner." (Trial Exhibit K-2; Findings of Fact, App., p. 52.) (Emphasis added.)

player contracts. The complaint further alleged that even if respondent Kuhn had the authority under the Agreement to disapprove such transactions, his decision was *ultra vires* because it was arbitrary, capricious and issued in bad faith. In separate counts, the complaint also alleged that the Commissioner's decision was the result of a conspiracy among all of the other Major League clubs in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and that the Commissioner's decision constituted state action which violated petitioner's right to due process and equal protection of the laws under the United States Constitution.

Prior to trial, the district court dismissed the antitrust, due process and equal protection counts on the ground that they failed to state a valid claim for relief.<sup>3</sup> The district court held that the business of baseball was not subject to the Sherman Act, relying on this Court's decisions in *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (*per curiam*), *reh. den.*, 346 U.S. 916 (1953); and *Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U.S. 200 (1922). (Memorandum Opinion and Order With Respect to Defendant Kuhn's Motion for Summary Judgment, App., pp. 46-47.)

After extensive pretrial discovery, the case was tried to the court, sitting without a jury, in December 1976 and January 1977. The trial consumed 15 days and involved the live testimony of 20 witnesses and thousands of pages of exhibits. At trial, the witnesses testified (and the exhibits related) to the background of the adoption of the Major League Agreement, the manner in which the clubs drafted

<sup>3</sup>Petitioner did not appeal to the Court of Appeals the district court's ruling that the complaint failed to state a valid claim for relief under the due process or equal protection clauses of the United States Constitution.

the language of the Agreement, the actions taken by the parties and the Commissioner pursuant to the Agreement since its adoption in 1921, the reliance of the parties on prior judicial interpretation of the language, and the intent of the present signatories in executing the Agreement. The trial also explored in depth the procedures followed by the Commissioner in this case as well as the validity of the Commissioner's reasons for disapproving the proposed assignments.

On March 17, 1977, in a decision supported by extensive and detailed findings of fact and conclusions of law, the district court concluded that Article I, Section 2 of the Major League Agreement and Rule 12(a) of the Major League Rules authorized the Commissioner to disapprove petitioner's proposed assignments and that the Commissioner's decision was reasonable and issued in good faith. Accordingly, the court entered judgment for respondent Kuhn.

After judgment was entered against petitioner on its claims, respondents Kuhn and the Boston Red Sox moved for judgment on their counterclaims, which alleged that by bringing suit petitioner had breached Article VII, Section 2 of the Major League Agreement. In this provision, petitioner and the other signatories to the Major League Agreement had covenanted to abide by the decisions of the Commissioner and expressly waived their right to challenge any of his decisions in court.<sup>4</sup> In reliance upon the record evidence, the district court found that the covenant not to sue "is clear and the results clearly intended" (Memoran-

<sup>4</sup>Article VII, Section 2 provides:

"The major leagues and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed in their favor." (Trial Exhibit K-1; Findings of Fact, App., p. 52.)

dum Opinion and Order With Respect to Defendants' Counterclaims, App., p. 80) and issued a declaratory judgment that Article VII, Section 2 is a valid covenant not to sue which petitioner had breached by filing this suit. The court concluded that this provision could be enforced in the future, but in the exercise of its discretion, the court declined to assess damages against petitioner.<sup>5</sup>

On petitioner's appeal, the United States Court of Appeals for the Seventh Circuit affirmed in all respects, holding unanimously that the evidence "fully supports, and we agree with" the district court's determination that Commissioner Kuhn was "given the express power to approve or disapprove the assignments of players" and that the Commissioner's decision in this case was reasonable and made in good faith. (569 F.2d at 534, 538.) The Court of Appeals also unanimously upheld the district court's ruling dismissing the antitrust count, noting that "the Supreme Court has held three times that 'the business of baseball is exempt from the federal antitrust laws.'" (*Id.* at 541.) The Court of Appeals also carefully considered and rejected petitioner's contentions that (1) the district court failed to make express findings concerning the fairness of the Commissioner's procedures, and (2) the district court had erred in limiting petitioner's cross-examination of Commissioner Kuhn to the scope of his direct examination. (*Id.* at 540.)

The Court of Appeals also affirmed, on the basis of Illinois common law, the district court's declaratory judgment holding that the covenant not to sue in Article VII, Section 2 of the Major League Agreement is valid and

<sup>5</sup> Respondents took no appeal from the district court's decision not to award damages for petitioner's breach of contract.

may, in the future, be enforced.<sup>6</sup> (*Id.* at 543.) Since the claim seeking the declaratory judgment had been founded on diversity of citizenship jurisdiction, the Court of Appeals examined the applicable conflicts of laws principles and concluded that the substantive law of Illinois, where the Major League Agreement had been executed, controlled the issue of the enforceability of the covenant. In reliance upon a consistent line of authority by the Supreme Court of Illinois, the Seventh Circuit held that the covenant in the Major League Agreement simply reiterated the Illinois common law of nonreviewability of private association actions and was fully consistent with Illinois and federal public policy. The Court of Appeals also held that enforceability of the covenant in the future would be subject to certain enumerated exceptions, none of which would have been applicable had the covenant been enforced in this case. (*Id.* at 544.)

#### ARGUMENT

The petition for a writ of certiorari asks this Court (1) to reconsider Baseball's exemption from the federal antitrust laws, which this Court has consistently, and as recently as 1972, upheld in the absence of contrary Congressional legislation; (2) to review two relatively minor and wholly inconsequential procedural rulings by the district court which were unanimously affirmed by the Court of Appeals; and (3) to review a question of state common law, which raises neither a Constitutional nor a federal law issue. Manifestly, no important question of federal law or other circumstance is presented that warrants review by this Court.

<sup>6</sup> In a concurring opinion, Chief Judge Fairchild stated that in his view the covenant might not be enforceable under Illinois common law. (569 F.2d at 545-546) Joining in the majority opinion in all other respects, Chief Judge Fairchild wrote that he would limit the force of the covenant to an indication of the extremely limited scope of judicial review of the Commissioner's actions intended by the parties to the Major League Agreement. (*Id.*).

**I. THIS COURT HAS CONSISTENTLY HELD, AS RECENTLY AS 1972, THAT THE BUSINESS OF BASEBALL IS NOT SUBJECT TO THE FEDERAL ANTITRUST LAWS, UNLESS AND UNTIL CONGRESS DETERMINES OTHERWISE**

On three separate occasions, and as recently as 1972, this Court has ruled that "the business of baseball" — including its fundamental and structural agreements and player control arrangements — is exempt from the federal antitrust laws. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (per curiam) reh. den., 346 U.S. 916 (1953); *Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U.S. 200 (1922). As the Court concluded in *Toolson*, "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U.S. at 357.

Against this background, and in the absence of any intervening Congressional legislation on this subject, petitioner's plea that this Court should once again consider a question it has thoroughly and definitively resolved on three prior occasions can only be regarded as frivolous.

Petitioner, a major league club owner which came into baseball long after the antitrust exemption had been established and reiterated, bases its plea for Supreme Court review on a contrived and implausible reading of *Federal Baseball*, *Toolson* and *Flood*. Specifically, petitioner argues that the Court intended to hold not the business of baseball, but only its "reserve system," to be exempt from the antitrust laws. This argument is untenable. It is contradicted by the repeated, unequivocal language in the Court's three decisions, the facts on which those decisions rested, and the unanimous interpretations by the lower federal courts of this Court's holdings that the entire

"business of baseball" — not simply the reserve system — is exempt from the antitrust laws.<sup>7</sup>

In *Federal Baseball*, plaintiff baseball club sued the two major leagues, contending, among other things, that the refusal of the two leagues to permit plaintiff to play games against the leagues' teams constituted a boycott in violation of the Sherman Act. In an opinion by Mr. Justice Holmes, the Court rejected plaintiff's claims on the ground that professional baseball is not within the scope of the federal antitrust laws. (259 U.S. at 208-09.)

In *Toolson*, the Supreme Court again ruled that the antitrust laws were inapplicable to professional baseball. (346 U.S. at 357.) *Toolson* was decided together with two companion cases, *Kowalski v. Chandler* and *Corbett v. Chandler*. In *Corbett*, plaintiff alleged that many aspects of professional baseball's structure violated the antitrust laws, including, *inter alia*, the Major League Agreement which, according to plaintiff, deprived the Pacific Coast League of Major League status and unreasonably restricted the number and location of Major League franchises. (346 U.S. at 363-64) (Burton, J. dissenting). After considering all three cases, the Court stated:

"In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal an-

<sup>7</sup>See, e.g., *Portland Baseball Club, Inc. v. Kuhn*, 368 F. Supp. 1004, 1007 (D. Ore. 1971), *aff'd per curiam*, 491 F.2d 1101 (9th Cir. 1974); *Salerno v. American League*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); *Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc.*, 282 F.2d 680 (9th Cir. 1960) (*per curiam*). See also *State v. Milwaukee Braves, Inc.*, 31 Wis 2d 699, 144 N.W.2d 1 (1966), *cert. denied sub nom. Wisconsin v. Milwaukee Braves, Inc.*, 385 U.S. 990.

*titrust laws.* Congress has had the ruling under consideration but has not seen fit to bring *such business* under these laws by legislation having prospective effect. The *business* has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation . . . . Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." (346 U.S. at 356-67.) (Emphasis added.)

In *Radovich v. National Football League*, 352 U.S. 445, *reh. den.*, 353 U.S. 931 (1957), this Court elaborated on its decision in *Toolson* and repeated in unequivocal terms its ruling as to the inapplicability of the antitrust laws to the business of professional baseball. Explaining its rationale, the Court stated:

"In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball*. The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led

the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years." (352 U.S. at 450-51.) (Footnotes omitted.)

In 1972, in *Flood*, the Supreme Court held again that professional baseball is exempt from the antitrust laws. Although the *Flood* case involved an antitrust challenge to Baseball's reserve system, the Court did not confine its holding to that narrow aspect of professional baseball:

"We repeat for this case what was said in *Toolson*:

"Without re-examination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.' 346 U.S. at 357." (407 U.S. at 285.)

Congressional action in response to the decisions of the Supreme Court confirms that the business of baseball as a whole is exempt from the federal antitrust laws. As the Court observed in *Flood*: "Since *Toolson* more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball," but none was passed. (407 U.S. at 281.) Based on its thorough review of Congressional action during this period, the Court concluded that it would be improper to alter the antitrust immunity set forth in *Federal Baseball* and *Toolson* because:

"Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has

clearly evinced a desire not to disapprove them legislatively.”<sup>8</sup> (407 U.S. at 283-84.)

In the six years since *Flood*, Congress has still taken no action on this matter, thereby demonstrating again “by its positive inaction” that it desires “not to disapprove them [the *Federal Baseball*, *Toolson* and *Flood* decisions] legislatively.”

In light of this judicial and legislative history, petitioner ultimately concedes that the scope of Baseball’s antitrust exemption is far broader than the reserve system and, indeed, encompasses the very practices of the Commissioner challenged in this case. Thus, in the Court of Appeals, petitioner admitted that Baseball’s antitrust exemption applies not only to the reserve system, but also applies to:

“those rules, contracts, agreements and practices which developed during the 50 years following the Court’s ruling in *Federal Baseball*.” (Reply Brief of Appellant Charles O. Finley & Co., Inc., p. 30.)

In its Petition to this Court, petitioner concedes that, in addition to the reserve system, Baseball’s “historically essential sports practices,” developed prior to *Toolson* and in

<sup>8</sup>Congress’s clear and consistent refusal to enact any legislation limiting Baseball’s antitrust immunity during the 25 years since the 1953 *Toolson* decision overwhelmingly refutes petitioner’s contention — raised for the first time in the Court of Appeals and based entirely on selected portions from a 1952 House Committee Report, issued prior to *Toolson* — that Congress intended Baseball to have a severely limited antitrust immunity. Indeed, the report on which petitioner relies expressly recommended “no legislative action” (at p. 232) even though the only existing case at that time was *Federal Baseball*, which held that Baseball was not interstate commerce and that Congress did not intend it to be subject to the antitrust laws. Indeed, the only bills on this matter which have ever passed either house of Congress have been to the effect of approving, rather than repealing, Baseball’s antitrust exemption. See, e.g., H.R. 10378, 85th Cong., 2d Sess. (1958) and S. 950, 89th Cong., 1st Sess. (1965).

reliance on *Federal Baseball*, are also exempt from the antitrust laws. (Petition for Writ of Certiorari, pp. 16, 19, 22 (Emphasis omitted.) [hereinafter cited as “Petition, p. \_\_\_\_.”].)

Even if this narrow reading were correct, the Findings of Fact adopted by the district court, and affirmed by the Court of Appeals, establish that the practice of the Commissioner of Baseball of disapproving any transaction which he deems “not in the best interests of baseball” — including assignments of player contracts — historically has been viewed as essential for the success and survival of the game and has been among the most vital of the “rules, contracts, agreements and practices which developed following [and in reliance on] the Court’s ruling in *Federal Baseball*.”<sup>9</sup>

Thus, having been a well-established precedent long in advance of the *Toolson* decision, the practice of the Commissioner of Baseball of voiding transactions — including assignments of player contracts — as “not in the best interests of baseball,” in the exercise of his authority under the game’s basic structural agreement, is clearly a “historically essential sports practice” exempt from the antitrust laws even under petitioner’s narrow reading of that exemption.

Finally, even though the district court dismissed petitioner’s antitrust claim prior to trial, petitioner was still permitted to attempt to show at trial — on the issue of whether the Commissioner’s action in this case was ar-

<sup>9</sup>As the Court of Appeals stated:

“During his almost 25 years as Commissioner [1921-1944], Judge Landis [Baseball’s first Commissioner] found many acts, transactions and practices to be detrimental to the best interests of baseball in situations where neither moral turpitude nor a Major League Rule was involved and he disapproved several assignments.” (569 F.2d at 537.)

bitrary or capricious — that the Commissioner and/or other Major League club owners were motivated by “the unwholesome business purposes of fixing the price for major league player talent and financially forcing Petitioner out of baseball.” (Petition, p. 14.) (Emphasis omitted.)

Petitioner failed completely in this attempt, producing no evidence to support these melodramatic allegations. Upon hearing all the evidence, the district court, affirmed by the Court of Appeals, concluded that the Commissioner’s action in disapproving petitioner’s attempted assignments of player contracts was based solely on the reasons specified by the Commissioner in his written decision and that the Commissioner acted unilaterally, in good faith and in what he reasonably believed to be the best interests of Baseball. (Findings of Fact, App., pp. 67-69.) Thus, even if the court had not dismissed petitioner’s antitrust claim, it would have been compelled by the evidence to conclude that there was no merit to it.

Accordingly, we submit that there is no basis for the Court to review the lower court’s unanimous affirmance of the dismissal of petitioner’s antitrust claim.

## II. THE ADEQUACY OF THE DETAILED FINDINGS OF PROCEDURAL FAIRNESS, AFFIRMED UNANIMOUSLY BY THE COURT OF APPEALS, PROVIDES NO BASIS FOR REVIEW BY THIS COURT

Petitioner also seeks certiorari on the ground that “the District Court made no findings nor conclusions that the Commissioner’s action was procedurally fair.” (Petition, p. 39.) Simply stated, petitioner’s allegation is untrue. The district court made detailed findings of fact and rendered a conclusion of law concerning the fairness of the Commissioner’s procedures, as demonstrated by the Court of

Appeals’ unanimous affirmance of these findings and rejection of an identical contention by petitioner. (Findings of Fact, App., pp. 67-68; Conclusions of Law, App., p. 70.) In any event, we submit that this issue is not even worthy of certiorari consideration by this Court.

As set forth below, the district court rendered extensive Findings of Fact on the procedural fairness of Commissioner Kuhn’s action.<sup>10</sup> Based on these findings, the district court stated in its conclusions of law that the Com-

<sup>10</sup>The trial court’s findings on procedural fairness include the following:

“48. At the beginning of the scheduled hearing on this matter in the Commissioner’s office on June 17, Commissioner Kuhn expressly noted that one of the options available to him was to set aside the assignments. All of the parties took advantage of the opportunity to present what they deemed to be the relevant facts and considerations, including Mr. Finley.

“49. No one in attendance at the hearing, including Mr. Finley, claimed at the hearing that the Commissioner lacked the authority to disapprove the assignments. Moreover, no one objected to the holding of the hearing, or to any of the procedures followed at the hearing.

“50. On the day following the hearing, June 18, 1976, defendant Kuhn reached the conclusion that the attempted assignments of Rudi, Fingers and Blue should be disapproved as not in the best interests of baseball. He then drafted a written decision in which he stated this conclusion and set forth each of the reasons why, in his judgment, the attempted assignments should be disapproved. He sent the decisions via teletype to all interested parties.” (Findings of Fact, App., p. 67.)

\* \* \* \*

“55. The court finds that Commissioner Kuhn acted in good faith, after investigation, consultation and deliberation, in a manner which he determined to be in the best interests of baseball . . .” (*Id.* at 69.)

missioner "duly found" the transactions not to be in the best interests of baseball and that the Commissioner's disapproval was "neither arbitrary nor capricious." (Conclusions of Law, App., p. 70.)

The Court of Appeals unanimously held that the district court had provided it with "adequate findings" on the issue of procedural fairness. (569 F.2d at 540.) Indeed, the Court of Appeals noted that petitioner had not even argued to it that "the Commissioner's notice of hearing, the hearing itself, or his written decision with express reasons were procedurally unfair . . ." (*Id.*, n.45.)

Petitioner's claims that the Commissioner's decision was procedurally unfair because it represented a departure from the past are directly contravened by the express findings of the district court, affirmed by the Court of Appeals as fully grounded in the record evidence. The district court expressly found, and the record fully substantiates, that prior Commissioners had "disapproved several player assignments," that Commissioner Kuhn had previously "taken broad preventive or remedial action with respect to assignments of player contracts," that prior judicial authority had put all parties on notice that the Commissioner's approval of a proposed player assignment was discretionary and not merely ministerial<sup>11</sup> and that petitioner's president had acknowledged in the past his awareness of the Commissioner's authority by requesting the Commissioner to disapprove certain player transactions. (Findings of Fact, App., pp. 58, 60, 65.) In light of these substantiated findings, the Court of Appeals was clearly correct in concluding that all parties to the Major League Agreement had ample notice of the Commissioner's authority and that his actions in this case did not constitute any change in practice. (569 F.2d 537-38.)

<sup>11</sup>*Milwaukee American Ass'n v. Landis*, 49 F.2d 298, 302-03 (N.D. Ill. 1931).

Since the Court of Appeals had no difficulty in reviewing and unanimously affirming the district court's findings of fact on the issue of the Commissioner's procedural fairness, we submit that petitioner's totally unfounded contention that the findings were inadequate provides no basis for review in this Court.

### III. THE AFFIRMANCE BY THE COURT OF APPEALS OF THE TRIAL COURT'S LIMITATION OF CROSS-EXAMINATION TO THE SCOPE OF DIRECT WAS CORRECT AND PRESENTS NO ISSUE FOR REVIEW BY THIS COURT

Petitioner asserts that the trial court erroneously excluded evidence with respect to its claim of malice on the part of the Commissioner by improperly limiting its cross-examination of the Commissioner. This contention should be rejected because (1) there was, in fact, no exclusion of any proffered evidence on this issue; (2) the Court of Appeals correctly held that the trial court acted properly and within the scope of its discretion in placing a reasonable limitation on the scope of cross-examination; and (3) the disputed trial court ruling was inconsequential in this case and does not have any significance for any other case.

Petitioner's contention, broadly asserted at least five times in its petition to this Court (Petition, pp. 32, 33, 34, 36, 37) that the trial court "repeatedly" or "consistently" excluded evidence relating to malice is, in plain language, false. Significantly, petitioner never identifies any of the evidence allegedly excluded or the portions of the trial transcript at which the alleged exclusions occurred. The fact of the matter is that petitioner's claim is premised exclusively upon a reasonable limitation placed by the trial court on petitioner's cross-examination of Commissioner Kuhn, restricting the scope of cross-examination to his direct examination.

During its direct case, petitioner was permitted to introduce all proffered evidence with respect to its claim that the Commissioner had acted out of malice toward petitioner when he disapproved his proposed assignments. This proffered evidence included the deposition testimony of the Commissioner which petitioner's counsel had taken concerning prior relations between the Commissioner and petitioner. At the end of respondent's case, Commissioner Kuhn took the stand in his own defense and was not asked any questions on direct examination about his prior dealings with petitioner. During the second day of petitioner's counsel's cross-examination of Commissioner Kuhn, the court sustained an objection to an inquiry into prior incidents between petitioner and the Commissioner. (Trial Transcript 2003.)<sup>12</sup> Apart from this ruling, petitioner's counsel was permitted to conduct vigorous and prolonged cross-examination concerning the Commissioner's state of mind in rendering his decision, concerning each of the reasons set forth in his written decision and concerning all conversations which he had had with anyone (other than counsel) during and after the decision-making process.

In affirming the trial court's ruling on this matter, the Court of Appeals correctly held that:

"since the subject had not been covered in direct examination, the court in its discretion could restrict the cross-examination to the scope of the direct; and since the subject of malice and motivation had been covered in . . . testimony [of

<sup>12</sup>This was the same ruling which the trial court, at the request of petitioner's counsel, had applied earlier in the trial when respondent's counsel was cross-examining petitioner's president. When respondent's counsel attempted to cross-examine petitioner's president concerning his prior relations with the Commissioner, the court sustained an objection by petitioner's counsel to this line of questioning. (Trial Transcript 811.)

petitioner's president] and in the Commissioner's deposition, the court could exclude it as cumulative regardless of its relevancy." (569 F.2d at 540.)

The issue was inconsequential in this case because based on the entire record, including almost two days of petitioner's cross-examination of Commissioner Kuhn, the trial court concluded (and the Court of Appeals unanimously affirmed) that the Commissioner's disapproval of the proposed assignments was made in good faith, without malice and based solely on the reasons set forth in the Commissioner's written decision. It is inconceivable that any further cross-examination by petitioner's counsel into prior, unrelated matters would have had any effect on these conclusions.

Not only was this ruling inconsequential and non-prejudicial in the instant case, but petitioner has not suggested — and we cannot perceive — any significance that this ruling may have in any other litigation. Accordingly, we submit that there is no reason for this Court to review this matter.

#### IV. A DECLARATORY JUDGMENT THAT FUTURE ENFORCEMENT OF A COVENANT NOT TO SUE IS PERMITTED BY ILLINOIS COMMON LAW PROVIDES NO BASIS FOR REVIEW BY THIS COURT

Finally, petitioner seeks certiorari on a ruling which was not part of the trial of this case and which did not in any way aggrieve petitioner. The Court of Appeals' affirmance of a declaratory judgment holding that in future cases the covenant not to sue contained in the Major League Agreement may, with certain exceptions, be enforced, is not appropriate for review on writ of certiorari in this case because (1) no federal or Constitutional law question is

presented; (2) the lower court's decision simply interpreted a contractual provision under applicable state common law; (3) the decision is consistent with the prior holdings of the Illinois Supreme Court and the rationale of several recent decisions of this Court; and (4) as noted, the decision did not prevent petitioner from obtaining a full-fledged trial on the merits of its claims and will operate only *in futuro*.

In entering a declaratory judgment that the covenant not to sue in the Major League Agreement is valid and may be enforced in the future, the district court found that the covenant "is clear and the results clearly intended." (Memorandum Opinion and Order With Respect to Defendants' Counterclaims, App., p. 80.) The district court relied on evidence which demonstrated that the covenant was adopted knowingly, intelligently and voluntarily by the club owners — sophisticated businessmen and corporations of equal bargaining power represented and advised by counsel — in an effort to promote their self-perceived common business interest. (Trial Transcript 1629, 1644; Trial Exhibits K-82 p. 14, K-89 p. 39, K-91 p. 13, K-95 pp. 9-10.) The district court held that the covenant could be enforced in the future because "[i]t is the law that informed parties, freely contracting may waive their recourse to the courts." (Memorandum Opinion and Order With Respect to Defendants' Counterclaims, App., p. 80.)

Affirming, the Court of Appeals held that an agreement among members of a voluntary association to settle their grievances internally and to avoid litigation is consistent with, and simply reiterates, the governing Illinois common law of private voluntary organizations. (569 F.2d at 542-43.) The Court of Appeals also found that the covenant is consistent with the public policy of Illinois and the many other states which have adopted the Uniform Arbitration Act (Ill. Rev. Stat. Ch. 10, § 101) and consistent with the trend

reflected in recent decisions of this Court as well as many state and lower federal courts.<sup>13</sup>

Petitioner does not (and could not legitimately) contend that the covenant not to sue violates the United States Constitution or any federal statute. Nor does petitioner contend that the challenged covenant prevented it from receiving a full and fair judicial trial on its claims against the Commissioner.

Petitioner's request for this Court to grant a writ of certiorari is premised upon the speculation that other "trade and professional associations," in reliance on the Court of Appeals' holding, may adopt similar covenants which "can and will foreclose their members from challenging any future association action." (Petition, p. 26.) Such speculation presents no basis for review by this Court. There is no evidence in the record that any other association has or is even considering adopting any such provision. Further, it is impossible to speculate on the circumstances surrounding any possible future adoption or enforcement of such a covenant. We submit that, if Supreme Court review of this issue is ever appropriate, it should await a case in which a covenant not to sue has actually been enforced and a party deprived of its opportunity to litigate its claims in court. Only in such a case, will the Court be able to consider the circumstances of the adoption of the covenant, the applicability of the exceptions set forth by the Court of Appeals and the effects of the enforcement of the covenant in the particular case presented.

Moreover, no review by this Court is warranted because the Court of Appeals' decision was correct. The Supreme

<sup>13</sup>The Court of Appeals held that the enforceability of the covenant in the future would be subject to exceptions, where the action by the association is (1) in contravention of the laws of the land; (2) in disregard of the charter or bylaws of the association; or (3) taken without following the basic rudiments of due process of law. (569 F.2d at 544.)

Court of Illinois has consistently, and as recently as 1976, held that "courts . . . will not intervene in questions involving the enforcement of bylaws and matters of discipline in voluntary associations." *Technical Engineers Local 144 v. La Jeunesse*, 63 Ill. 2d 263, 347 N.E.2d 712, 715 (1976); *Werner v. International Association of Machinists*, 11 Ill. App. 2d 258, 137 N.E.2d 100, 108 (1956); *Engel v. Walsh*, 258 Ill. 98, 101 N.E. 222, 223-24 (1913).

Petitioner's sole contention is that such a covenant, regardless of the circumstances surrounding its adoption or enforcement, contravenes public policy. In support of this notion, petitioner relies exclusively on antiquated and inapposite cases decided primarily in the late nineteenth century.<sup>14</sup>

Both the district court and the Court of Appeals were correct that present day public policy, as manifested in relevant statutes and in recent decisions of this Court, favors private agreements which resolve disputes without the cost and delays of litigation. This policy is reflected in the Uniform Arbitration Act, which has been adopted by Illinois and at least 20 other states, and in the United States Arbitration Act, 9 U.S.C. §§ 1-14 (1976). Indeed, this Court has held that the federal arbitration statute controls any state law to the contrary, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and that private agreements to waive all review of an arbitrator's

<sup>14</sup>None of the Supreme Court cases upon which petitioner relies was decided after 1891, and none of the federal cases which petitioner claims conflict with the Court of Appeals decision here was decided after 1934. Virtually all of the petitioner's cases are premised upon the once prevalent, but now thoroughly repudiated, judicial hostility to arbitration agreements. See, e.g., *Owsley v. Yerkes*, 187 F. 560, 563 (2d Cir. 1911); *Tatsuuma Kisen Kabushiki Kaisha v. Prescott*, 4 F.2d 670 (9th Cir. 1925). None of the cases attempts to interpret a freely bargained for contractual provision under contemporary Illinois and federal standards.

decision are valid and enforceable. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20, *reh. den.*, 419 U.S. 885 (1974). See also *Rossi v. TWA*, 507 F.2d 404 (9th Cir. 1974), *aff'g per curiam*, 350 F. Supp. 1263 (C.D. Cal. 1972); *Euzzino v. London & Edinburgh Insurance Co.*, 228 F. Supp. 431, 433 (N.D. Ill. 1964).<sup>15</sup>

Two other recent decisions of this Court strongly support the conclusion that public policy in today's world of overcrowded court dockets favors private resolution of controversies without the risks and hazards of protracted litigation. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). In *Overmyer*, this Court upheld the validity of a private contract in which one party agreed in advance of any dispute that in the event of its failure to pay the contractual amount, the party would, if sued, confess judgment, waive all defenses it might otherwise have had to the lawsuit and forego any appeal from the judgment entered against it. The Court held that all of these corporate, property and civil rights may be waived if the waiver is "voluntary, knowing, and intelligently made." (405 U.S. at 185.)

In *Bremen*, this Court upheld a private contractual agreement whereby an American citizen agreed not to sue in any court other than the High Court of Justice in London, England. The Court held that the provision "was made in

<sup>15</sup>Petitioner asserts that the covenant not to sue in the Major League Agreement should be invalidated because it is "repugnant to the salutary maxim that no man shall be the judge of his own case." (Petition, p. 28) The fact is that the Commissioner is not a party to the Major League Agreement. He is the arbiter which the signatories to the Major League Agreement, the 26 major league clubs, have retained to resolve their disputes. By this covenant, the clubs, including petitioner, have agreed among themselves for their self-perceived common benefit to be bound, and to abide fully, by the Commissioner's decisions. Thus, the policies reflected in the state and federal arbitration statutes are fully applicable in this situation.

an arm's length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reasons, it should be honored by the parties and enforced by the courts" which should "give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement . . . ." (407 U.S. at 12.)

In affirming the district court's declaratory judgment in the instant case, the Court of Appeals simply ruled that, in the future, courts may uphold the legitimate expectations of the signatories to the Major League Agreement when they knowingly, voluntarily and willingly agreed to abide by the decisions of the Commissioner and to refrain from challenging his decisions in the courts. We submit that there is no need for this Court to review this clearly correct interpretation of state law, which comports in all respects with present day public policy.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: August 31, 1978

**AUG 30 1978**

RODAK, JR., CLERK

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**IN THE**  
**Supreme Court of the United States**  
**October Term, 1978**

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**No. 78-10**

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**CHARLES O. FINLEY & CO., INC.,**  
an Illinois Corporation,  
*Petitioner,*  
  
v.

**BOWIE K. KUHN,**  
Commissioner of Baseball, *et al.,*  
*Respondents.*

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**BRIEF OF RESPONDENT AMERICAN LEAGUE  
OF PROFESSIONAL BASEBALL CLUBS AND  
RESPONDENT NATIONAL LEAGUE OF  
PROFESSIONAL BASEBALL CLUBS IN OP-  
POSITION TO PETITION FOR A WRIT OF CER-  
TIORARI**

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**STATEMENT OF POSITION**

The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs were defendants only under the antitrust count (Count II) of the complaint. Prior to trial, the District Court dismissed this Count; and the Court of Appeals unanimously upheld this ruling of the District Court.

We agree with the position of the Commissioner of Baseball and hereby adopt rather than reiterate the statements of the Commissioner concerning the antitrust aspects of the petition for certiorari (Brief of respondent Kuhn, pp. 8-14).

For those reasons, we respectfully submit that the petition for a writ of Certiorari should be denied.

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Supreme Court, U.S.  
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*Respondent.*

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**Petitioner's Reply to Opposition to Petition  
for a Writ of Certiorari.**

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*Respondent.*

**Petitioner's Reply to Opposition to Petition  
for a Writ of Certiorari.**

**I**

**Introduction.**

In the instant case Organized Baseball, by its Commissioner, seeks not only the maintenance of "a derelict in the stream of law," but the expansion of that derelict to exempt forever from antitrust jurisdiction the entire stream of commerce that constitutes this "big business that is packaged with beer, with broadcasting, and with other industries." *Flood v. Kuhn*, 407 U.S. 258, 286 (1972). According to Respondent, Baseball's exemption cloaks all of today's extensive baseball business, not just its reserve system or its historically essential sports practices. However, Congress has specifically refuted this very position by rejecting bills which would have granted "professional baseball . . . a complete immunity from the antitrust laws."

H.R. Rep. No. 2002, 82d Cong., 2d Sess., at 230 (1952).

Concurrently, Organized Baseball exhorts this Court not to disturb the aspect of the appellate court's judgment upholding baseball's blanket waiver of recourse to the courts, which would perpetually preclude every federal court from exercising diversity or federal question jurisdiction, both of which were invoked at bar, over any decision rendered by the Commissioner of Baseball. Baseball bases this exhortation on the patently specious theory that the waiver issue does not involve a question of federal law.

If this Court is willing to acquiesce in Organized Baseball's stealthy expansion of "the *reserve system's exemption*" from the antitrust laws, *Id.* at 281, and in the enforcement of Baseball's blanket waiver of recourse to the courts, the result will be an absolute, unfettered monopoly over this multi-billion dollar business—one unbridled by any source of competition, free to extend that monopoly by unreasonable restraints of trade to its numerous interrelated industries, and completely immune from any judicial recourse by its victims. In fact, the instant judgment, if not reversed, would stand for the proposition that Organized Baseball's hierarchy may intentionally conspire to fix the price of player talent at an artificially low level, engage in a group boycott designed to bankrupt one of its non-parallel members, and then preclude the federal courts from entertaining the victim's suit, whether it be based on antitrust or other theories. Petitioner submits that the case and statutory law unequivocally refute the Court of Appeals judgment, and respectfully urges this Court to review and reverse, not sanction, such a disastrous and unjust precedent.

## II

### **Only Baseball's Reserve System, Not Its Entire Business, Is Exempt From the Antitrust Laws.**

Organized Baseball's erroneous claim that its entire business is exempt from the antitrust laws is based upon a misreading of *Federal Baseball*, *Toolson* and especially *Flood*, and a total disregard of the reasons on which this Court based its exemption of baseball's *reserve system*. Each of the violations of the antitrust laws alleged by the plaintiffs in *Federal Baseball*, *Toolson* and *Flood* involved only the enforcement of baseball's *reserve system*. Further, while Congress has endorsed protection for the reserve system, it has fully reviewed and repeatedly rejected bills which would have exempted the entire business of baseball from the antitrust laws. H.R. Rep. No. 2002, 82d Cong., 2d Sess., at 230-1 (1952); H.R. Rep. No. 94-1786, 94th Cong., 2d Sess., p. 38 (1977). The granting of exemptions from the antitrust laws "is a matter within the discretion of Congress." *Toolson v. New York Yankees*, 346 U.S. 356, 364 (1953). Consequently, this Court's acquiescence in Organized Baseball's demand for blanket immunity for its entire business from the antitrust laws, after Congress rejected that precise request, would not only frustrate Congressional intent but also violate the separation of powers doctrine. For these reasons Petitioner submits that this Court should grant the instant Petition, reiterate what it held in *Flood v. Kuhn*, *supra*, —that only baseball's reserve system, not its entire business, is exempt from

the antitrust laws<sup>1</sup>—and reverse the judgment of the appellate court.

Respondent's contention that the plaintiff in *Federal Baseball* alleged that the refusal of defendant leagues to permit plaintiff to play games against the leagues' teams violated the antitrust laws (Opposition, p. 9) is incorrect. The plaintiff's allegations were set out in full in *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore*, 269 Fed. 681, 683-4 (D.C. Cir. 1921), and state that by the enforcement of the "reserve clause" the National and American Leagues gained control over practically all available skilled players and thereby denied the Federal League of the ability to produce exhibitions of baseball. *Id.*

Similarly, while the three plaintiffs in *Toolson* alleged that organized baseball was a monopoly, each alleged that he had "been damaged by enforcement of the standard 'reserve clause'" and "because of illegal and inequitable agreements . . . binding each (league) to respect the other's 'reserve clauses'." *Toolson v. New York Yankees*, *supra* at 346 U.S. 356, 362-4. (Emphasis and parentheses added.)

Finally, this Court in *Flood v. Kuhn*, *supra*, made it clear that in *Federal Baseball*, *Toolson* and *Flood* ("for the third time in 50 years") it had been "asked specifically to rule that professional baseball's reserve system is within the reach of the antitrust laws." *Id.* at 259. (Emphasis added.) The Court's ultimate hold-

<sup>1</sup>This is not to say that Petitioner opposes a reversal of *Flood's* exemption of the reserve system. Petitioner's position is simply that under the current state of the law only the reserve system is exempt, its action does not challenge the reserve system, and therefore the judgment dismissing the action must be reversed.

ing was that "with its reserve system enjoying exemption from the antitrust laws, baseball is . . . an exception and an anomaly." *Id.* at 282. (Emphasis added.)

The reasons the *Flood* Court cited for exempting the reserve system underscore the exception's limits. The Court recognized that Organized Baseball had detrimentally relied on *Federal Baseball* during the thirty years prior to *Toolson*, but concluded that such reliance extended only to the violation alleged in *Federal Baseball*—the reserve system. *Id.* at 274. Detrimental reliance obviously cannot excuse the alleged violation at bar—an intentional conspiracy designed to fix the price of player talent and to drive Petitioner out of the business of baseball.

Most importantly, the standard of Congressional inaction cannot justify the exemption of the entire business of baseball from the antitrust laws. Congress did endorse the reserve system, *Id.* at 407 U.S. 272-3, and it did fail to overrule *Federal Baseball* and *Toolson*, which dismissed actions challenging the reserve system. These facts led this Court to conclude correctly "that Congress has as yet no intention to subject baseball's reserve system to the reach of the antitrust statutes." *Id.* at 283. (Emphasis added.) However, Congress has acted on the very demand Organized Baseball now makes—that its entire business be exempted from the antitrust laws. Congress specifically rejected bills providing that "professional baseball be granted a complete immunity from the antitrust laws" in 1952 (H.R. Rep. No. 2002, 82d Cong., 2d Sess., at 230) and reaffirmed this aspect of its 1952 report in 1977. H.R. Rep. No. 94-1786, 94th Cong., 2d Sess., p. 38. Thus, Respondent's contention that "Congressional action . . . confirms that the business of baseball as a whole is

exempt from the antitrust laws," (Opposition, p. 11), is utterly false. Indeed, Congressional inaction—the "quicksand" [*Helvering v. Hallock*, 309 U.S. 106, 121 (1940)] on which the Court has stanchioned the exemption of baseball's reserve system, could not provide a firmer foundation for the *refutation* of Organized Baseball's contention that its *entire business* is exempt.

Implicitly recognizing the absence of any justification for the exemption of the entire business of baseball, Respondent alternatively attempts to characterize his disapproval of Petitioner's assignments, which fully complied with the Major League Rules, as an historically essential sports practice which developed prior to *Toolson* in reliance on *Federal Baseball*. (Opposition, pp. 12-13). This argument fails on three counts. First, the disapproval of the assignments constituted only one part of a conspiracy designed to fix the price of player talent and to drive Petitioner out of baseball, which conspiracy obviously is not an historically essential sports practice. Second, the evidence conclusively established that the disapproval of an assignment complying with the rules was not an historically essential sports practice. Prior to the case at bar no undisputed assignment which fully complied with the Major League Rules had ever been disapproved. [R.T. 455; 585.] All of Commissioner Landis' assignment disapprovals, on which Respondent relies, involved disputes between clubs or rules violations, and Respondent's requested findings that these disapproved assignments *complied* with the rules were *rejected* by the District Court. [Resp.'s Prop. Findings 42, 44, 45, 46, 48; Findings of Fact, Conclusions of Law, March 17, 1977 Judgment Order.] The complete lack of evidence to support

this premise is revealed by Commissioner Kuhn's admission before Congress in 1972, twenty years *after Toolson*, that "The Commissioner is not given a right of consent on a contract transfer." [R.T. 570-1.]

Third, Petitioner's antitrust cause of action alleged that the historical practice regarding assignments has been that the Commissioner ministerially approves all assignments which comply with the Major League Rules. [Complaint, par. 32.] On the dismissal of a complaint by the District Court, such an allegation must be taken as true. *United States v. International Boxing Club*, 348 U.S. 236, 240 (1955). This fundamental rule also disposes of Respondent's last contention. This *non sequitur* suggests that because Petitioner failed to prove the allegations of its *antitrust* action by the evidence it tendered in support of the theory that Respondent's decision was *arbitrary*, the dismissal of the antitrust action need not be reversed. (Opposition, pp. 13-14.) Aside from the complete dissimilarity between the two actions and the Respondent's objection to and foreclosure of discovery supporting Petitioner's antitrust action once it was dismissed, these allegations must be taken as true regardless of any asserted failure of proof on other issues. *Id.*

In conclusion, Petitioner submits that only baseball's reserve system is exempt from the antitrust laws, that Petitioner's antitrust action does not challenge that system, and that the judgment dismissing the action was therefore in error.

III

**Baseball's Blanket Waiver of Recourse to the Courts  
Violates Federal and State Public Policy.**

Respondent urges that the validity of a contractual waiver of the diversity and federal question jurisdiction of the *federal* courts is dependent upon *state* common law—in this instance that of Illinois—and therefore no federal question is presented by this petition. (Opposition, pp. 19-20.) If this proposition were true, the states could have long ago effectively deprived the federal courts of their jurisdiction. However, this Court rejected this very argument in *Home Ins. Co. v. Morse*, 87 U.S. 445, 450 (1874), in which a contractual clause waiving a party's federal statutory right of removal was held in violation of *federal* public policy despite state law providing for and upholding the validity of the clause. This aspect of *Home Ins. Co. v. Morse* was reaffirmed by this Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 at fn. 10 (1972).

In Title 28 U.S.C. §§ 1331 and 1332 Congress declared that the federal courts shall have jurisdiction of "all civil actions" where a federal question is presented or diversity of citizenship lies. This Court has held that "a party cannot stipulate away such a jurisdiction which the legislature (Congress) declares open." *The Anaconda v. American Sugar Ref. Co.*, 322 U.S. 42, 46 (1943). (Parentheses added.) Thus, Organized Baseball's waiver of recourse to the courts, whereby the parties to the Major League Agreement purport

to stipulate away the diversity and federal question jurisdiction which Congress declared open, is invalid as a matter of *federal* law. The *Home Insurance* and *Anaconda* cases are only two of the long established and still firmly-intact line which holds that a blanket waiver of recourse to the courts constitutes an unmitigated attempt to oust the federal courts of their jurisdiction and thereby violates *federal* public policy. *Guaranty Trust & Safe Deposit Co. v. Greencove R.R.*, 139 U.S. 137, 143 (1891); *McCulloch v. Clinch-Mitchell Const. Co.*, 71 F. 2d 17, 21 (8th Cir. 1934); *Beuttas v. United States*, 60 F. Supp. 771, 780 (Ct. Cl. 1944).

Despite these precedents, Respondent further contends that the District and Appellate Courts were correct in concluding that this Court's decisions in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); and *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), would uphold Baseball's blanket waiver of recourse to the courts (Opposition, pp. 21-24; Opinion by Judge Sprecher, pp. 32-33; Opinion by Judge McGarr, p. 80.) This contention is without merit. As demonstrated in the Petition (p. 31), these three cases lend no support for the holding that baseball's unlimited and unknowing waiver of all future recourse to the courts is valid. Conversely, none of the numerous federal cases invalidating a blanket waiver of recourse to the courts has been disapproved. Since Baseball's blanket waiver was accepted by Petitioner on a "take

it or leave it basis," since it authorizes the Commissioner to instigate and then finally decide a dispute to which he is a party, since it exculpates him from even his wilful and fraudulent acts, and since it stipulates away federal jurisdiction declared open by Congress, the waiver clause clearly violates *federal* and state public policy.

Respondent's proposition that this Court should defer review of the instant judgment upholding Baseball's blanket waiver and "await a case" in which "a party (has been) deprived of its opportunity to litigate its claims in Court," (Opposition, p. 21) is nonsensical. There is simply no reason to await such a case and several compelling grounds for immediate review. The instant judgment declaring the clause valid and enforceable is final, appealable and, according to *Respondent's* Motion for Summary Judgment, "presents one straightforward legal issue: whether a private contract to forego litigation . . . is enforceable in the courts." [Memorandum in Support of Summary Judgment, p. 2.] If this Court does defer review, other monopolistic private associations undoubtedly will adopt similar clauses in reliance on the precedent. Meanwhile, between now and the time Respondent's hypothetical case arises, countless members of Organized Baseball and any other private associations adopting such a waiver will forego meritorious litigation due to the chilling effect of the clause and the precedent upholding it. Petitioner submits that this high societal price is totally unnecessary.

Thus, Petitioner submits that Baseball's blanket waiver clearly violates federal public policy and respectfully urges this Court to review and reverse the judgment upholding it.

IV

**The District Court's Refusal to Receive or Consider Evidence of Respondent's Malice Toward Petitioner Denied Petitioner's Due Process Right to Present Evidence.**

Respondent's contention that the District Court did not refuse to receive or consider evidence of the Commissioner's malice toward Petitioner and simply placed a reasonable limitation on the scope of cross-examination is conclusively rebutted by the record,<sup>2</sup> which shows that on four occasions the Court ruled that it would not receive or consider evidence of the Commissioner's "motivation at the time, or his . . . lack of regard of Mr. Finley" because it "does not seem

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<sup>2</sup>MR. BLEAKLEY: . . . Mr. Finley has accused the Commissioner of Baseball, the defendant in this case, of acting out of malice and ill will toward him personally and persists in that allegation. I think in connection with that allegation we are entitled to show that on occasions in the past Mr. Finley has been somewhat difficult.

THE COURT: I don't think that is permissible because *I don't think that the motivation of the Commissioner is going to be very relevant*. It is whether he had the authority or whether he didn't.

MR. BLEAKLEY: Well, *if your Honor is ruling that motivation of the Commissioner is not relevant* I will be more than happy to drop that line of questioning but *it is an allegation in the plaintiff's complaint*.

THE COURT: Well, it is one that the testimony thus far has not really supported and *I don't think it is a serious allegation. I don't take it seriously. I am not interested in whether the Commissioner likes Mr. Finley or whether he doesn't. If he had the authority to do what he did, we have a legal issue, and that is the only one I am going to look at, so I will sustain the objection.*

\* \* \* \*

MR. BLEAKLEY: I have to belabor this—

THE COURT: I won't put you in the box, *I don't think that whether the Commissioner and Mr. Finley had any sort of a feud going or any personal animosity is relevant to the*

(This footnote is continued on next page)

relevant to me.” [R.T. 2003.] In the words of *Respondent’s* counsel during trial, “your Honor said that you didn’t take the allegation of malice seriously and you did not want to hear evidence on it.” [R.T. 2003.] This record demonstrates that the District Court did refuse to consider any evidence of malice and thereby refutes Respondent’s further contention that the rulings were inconsequential in this case.

Respondent finally submits that certiorari should be denied because the malice issue has no significance in any other litigation. To the contrary, the issue could have no broader significance. This Court’s mandate that “The refusal of a court to receive or consider any proof whatever on (a material issue) amounts

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*issues in this case, and that will be my attitude when Mr. Kuhn is on the stand as well.*

\* \* \* \*

MR. BLEAKLEY: Well, your Honor, when I was cross-examining Mr. Finley and I began to ask questions in the area of malice, *your Honor said that you didn’t take the allegation of malice seriously and you did not want to hear evidence on it.*”

THE COURT: *I do recall that.*

MR. BLEAKLEY: And I therefore dropped a very extensive line of questioning on cross-examination of Mr. Finley.

THE COURT: Is that why you’re going into it now, is that its relevance?

MR. PAPIANO: That is its relevance.

THE COURT: Right along, I have to be consistent, counsel, so I’ll sustain the objection.

MR. PAPIANO: Your Honor, you are, I’m sure that the Court is cognizant of the fact that *that is one of the allegations of the complaint* and that there is—we are making an offer of proof on that allegation.

THE COURT: I understand, that’s correct.

Just so that we can be clear on this, my judgment in the matter would be that since the issue in the trial is the Commissioner’s power to do what he did plus the other legal issues that I’ve adverted to, *his motivation at the time, or his regard or lack of regard of Mr. Finley does not seem relevant to me and the context of the case as I hear it.* So, that’s the reason for the ruling. [R.T. 810-12, 2003.] (Emphasis added.)

to a denial of a hearing on that issue, in contravention of the due process clause of the Constitution,” [(*Georgia Railway & Electric Co. v. City of Decatur*, 295 U.S. 165, 171 (1935) (parentheses added))] applies to *every single state* and *federal* case in the Union. Unless this Court is ready and willing to reiterate and enforce that mandate in those cases, such as the instant matter, in which the lower courts have violated it, this vital Constitutional protection will be lost.

### Conclusion.

For these reasons Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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### Of Counsel:

IVERSON, YOAKUM, PAPIANO & HATCH.

Service of the within and receipt of a copy  
thereof is hereby admitted this ..... day  
of September, A.D. 1978.

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